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No. 365

In the Supreme Court of the United States

October Term, 1958.

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, nee Wright, and Mary Ellen Cash, *Respondents*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND SUPPORTING BRIEF.

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IN THE SUPREME COURT OF THE UNITED STATES.

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No. .....

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, nee Wright, and Mary Ellen Cash, *Respondents.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, ~~AND SUPPORTING BRIEF~~.

Petitioner, Donald George Fleming, a minor, in person and by Leona Holcomb, as guardian of the person and estate of Donald George Fleming respectfully pray certiorari to the United States Court of Appeals, Tenth Circuit, to review a decision and order denying rehearing entered in

cases No. 5620 and 5621, wherein said court affirmed permanent injunctions entered by the United States District Court for the Northern District of Oklahoma, against further prosecution of a suit at law pending in the District Court of Tulsa County, Oklahoma, styled Leona Holcomb, et al., vs. Aetna Life Insurance Company, et al., No. 87,402, filed April 15, 1954, said suit being one for damages for the unlawful conversion on October 31, 1950, of certain United States Government Bonds having a then market value of $191,864.64 and to which suit the respondents here were parties.

A. Opinion of the Court Below.

The Opinion delivered in the United States Court of Appeals, Tenth Circuit, is reported at 255 F. (2d) 577.*1

B. Grounds On Which Jurisdiction of this Court is invoked.

The judgment and decree complained of was entered May 12, 1958. The Petition of Donald George Fleming for Rehearing was timely filed June 2, 1958, and by said court denied June 20, 1958. By order of June 27, 1958, Mandates of the United States Court of Appeals were stayed for a period of thirty days from June 29, 1958, under provisions of paragraph 3, Rule 28, and by order of July 25, 1958, and said mandates were further stayed until Sept. 18, 1958, under the provisions of paragraph 3, Rule 28.

Jurisdiction of this court to issue certiorari is invoked under 28 U.S.C.A. 1254, which reads:

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*1. For copy see Appendix, pages 19-31.

"Cases in courts of appeal may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *;"

and 28 U. S. C. A. 2101, sub-paragraph c, which reads:

"Any * * * writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree * * *."

"Time within which application could be made for review in the Supreme Court did not begin to run until after disposition of motion for new trial seasonably filed and entertained." *U. S. vs. Seminole Nation*, 1937, 57 S. Ct. 2833, 299 U. S. 417, 81 L. Ed. 3316; *Gypsy Oil Co. v. Escoe*, 48 S. Ct. 112, 275 U. S. 492, 72 L. Ed. 393.

C. Questions Presented for Review.

I

Where at a pre-trial conference, under Federal Rules of Civil Procedure, Rule 16, 28 U.S. C. A.[*2] *a federal court, without trial, evidence, findings of fact or conclusions of law enters a permanent injunction against prosecution of a state court action for damages, which is pending undetermined in the state court, does the entry of such an injunction.*

(a) Violate Art. 3, Sec. 2, Cl. 1 of the U. S. Constitution by extending federal judicial authority under interpleader statutes to include power to enjoin prosecution of a prior state court suit otherwise within the exclusive constitutional jurisdiction of the state court?

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*2. For rule in full see Appendix, page 31.

(b) Constitute denial of due process of law under the Constitution of the United States (Amend. V.)?

(c) Violate 28 U. S. C. A. 2283?

II

Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U.S.C.A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract?

III

In an action instituted in the federal court under 28 U.S.C.A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested as devisee under a will?

IV.

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335, where the record affirmatively discloses that by

their terms the insurance contracts in question are incontestable, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them, concerning any of the terms or conditions of the policies, or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res judicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto?

E. Statement of the Case.

Following the death of a maternal great-aunt, under whose will the petitioner is a beneficiary, petitioner discovered that on October 31, 1950, while the testatrix was incapacitated and helpless at Sapulpa, Oklahoma, a step-great-uncle, J.A.R., aided and abetted by others, surreptitiously and secretly entered the private safety deposit box of testatrix in Oklahoma City and took therefrom and converted into cash securities having then a market value of $191,864.64. Petitioner by his guardian filed in the District Court of Tulsa County, Oklahoma, cause No. 87,402 for damages.*3 This suit remains pending in said court undetermined.

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*3. For copy of petition in full see Appendix, page 32.

Instead of answering to the merits in said state court suit, Aetna Life Insurance Company, one of the defendants therein, filed in the U. S. District Court for the Northern District of Oklahoma, two separate suits, in each of which the petitioner here was designated as a defendant, the true object of each of which cases was to obtain an injunction to prevent prosecution of said cause No. 87,402, or any like suit in the state court.

The state court suit was not removable because there was no diversity of citizenship between the parties, neither has a petition or other proceeding for removal ever been undertaken.

Federal jurisdiction was invoked on basis of an allegation that a portion of the proceeds of the bonds converted found its way into the hands of Aetna Life Insurance Company, for which it issued an annuity described in the proceedings as Policy No. An 33409, to which annuity contract this petitioner was not a party. It is not contended that this petitioner was directly or indirectly a party to the annuity contract with Aetna or that he had any interest, directly or indirectly, in the issue of Aetna's liability under said contract.

Apparently, realizing the inadequacy of said cause No. 3502 as a basis of jurisdiction to enjoin prosecution by this petitioner of cause No. 87,402, or any like action in the state court, Aetna also filed in the U. S. District Court another and different cause of action against this petitioner as No. 3503, Civil. Therein it premised federal jurisdiction in an action in the nature of interpleader upon an allegation that before conversion of the bonds in controversy

Aetna had issued another and different insurance policy No. N1664203, an endowment policy, payable solely and only to this petitioner upon his reaching the age of twenty-six years. It was alleged that a portion of the proceeds from the bonds converted was used to pay a single premium of $23,143.03 upon the second policy.

At pre-trial an unsuccessful effort was made to point out to the trial court the circumstance that the policies in controversy were each incontestable by their specific terms; that by their specific terms a contest on the ground that premiums had been paid if such was true from misappropriated funds was expressly precluded; that petitioner here was not a party to the first contract and that the alleged annuitants named in the first suit were not parties to the endowment policy upon which the second suit was based. Since the insurance company failed to plead and no litigant asserted any ground which, upon the face of the record, would absolve the insurance company from liability under the express terms of its incontestable policies, and no circumstance or fact was averred to indicate controversy concerning obligations of the insurer or which would impose double liability upon it under the terms of its contracts, this petitioner, joined by others similarly situated, asserted that there was no cause of action in the nature of interpleader vesting jurisdiction in the federal court; that absent evidence to show such cause of action the only court of competent jurisdiction to try the issues in cause No. 87,402, was the state court in which said suit was pending.

These contentions, made by appropriate preliminary pleadings, by answer and at pre-trial, the federal court disregarded. Thereupon at said pre-trial, without evidence, trial, findings of fact or conclusions of law, the court summarily entered an order in each of said suits purporting to be a judgment in interpleader, finding the facts concerning liability of the insurer as at all times agreed upon by all parties. The federal court then entered permanent injunctions in each of said cases, enjoining this petitioner from the prosecution of cause No. 87,402.

Issuance of each injunction under the circumstance was assailed by motions for new trial and on affirmance in the appellate court by Petition for Rehearing without avail.

Petitioner's complaint here is that feigned and fictitious issues purporting to be in suits in the nature of interpleader have been wrongfully used as a basis of federal jurisdiction to sustain not merely one, but *two* injunctions in two separate suits. Both suits were calculated to prevent prosecution by this petitioner of his state court suit.

Petitioner's sole and only connection with the transactions complained of in both federal court suits was that at 11 years of age he was induced to sign an application for an insurance policy.*4

F. Reasons Relied Upon for Certiorari.

The discretionary power of this the Supreme Court of the United States, to issue certiorari is invoked under

*4. For copy see reproduction at end of Appendix.

Rule 19-B, upon the ground that the United States Court of Appeals for the Tenth Circuit, has so far departed from the accepted and usual course of judicial procedure and so far sanctioned such a departure by the lower court as to call for the exercise of this court's power of supervision.

The opinion complained of herein concedes diversity of opinions between that in the instant case and the rule announced in *Lowther* v. *New York Life Ins. Co.*, 8 Cir., 278 Fed. 405, wherein the rule was announced that a federal court may not permanently enjoin a prior state court suit in an interpleader action. The Tenth Circuit attempts to dispose of this contention in the following language:

> "Suffice to say that that case interpreted law in effect in 1922 and the clear language of 28 U.S.C.A. 2361 authorizes the permanent injunction in an interpleader matter."

The Circuit Court overlooks or disregards the circumstnces that the relative jurisdiction of state and federal courts stems from the Constitution; assumes that 28 U.S. C.A. 2361 enlarges federal jurisdiction by vesting in federal courts power to enjoin and, thereby, supersede prior jurisdiction constitutionally vested in a state court.

The question is of great and general public interest, for if state court jurisdiction in pending damage suits for conversion may be defeated by instituting a denominated federal court suit in interpleader, on the theory that the tortious converters of property are entitled to equitable relief to determine, *inter se*, how the spoils are to be divided, or some closely related question, an ingenious

method has been devised for transferring jurisdiction to determine pending cases from state to federal courts, even in cases neither removable nor removed from the state courts.

The Tenth Circuit has approved such a clear usurpation and abuse of jurisdiction and authority by a federal district court as to constitute special and important reasons justifying this court in the exercise of sound judicial discretion in granting certiorari.

A review of the record discloses that there neither was nor could be a justiciable issue either in interpleader or in the nature of interpleader for consideration of the federal court.

The record discloses without dispute that the insurance policies upon which federal jurisdiction was premised were by their express terms incontestable.

There was no dispute among the beneficiaries concerning the terms or conditions of either policy.

Aetna Life Insurance Company was not in danger of being subjected to double liability or to conflicting claims arising under either policy.

Jurisdiction to determine the question of whether or not certain registered United States Bonds had been secretly taken from the private safety deposit box of the testatrix on Oct. 31, 1950, was vested by law in the state court prior to the filing of any federal court suit. There was no diversity of citizenship, or fraudulent joinder, or petition to remove that suit, so that clearly federal jurisdiction to

determine the issues therein was under the constitution vested exclusively in the state court.

Institution of the federal court suits was but a ruse and device to circumvent prosecution of cause No. 87,402 in the state court, thereby evading not only trial by jury, but any trial conformable to the laws of the State of Oklahoma.

In the federal court, no effort was made to show by evidence at any trial that an action in the nature of interpleader existed.

Certain interveners on their application were by court order made parties in the federal court proceeding. These interveners were not parties directly nor indirectly to either of the insurance policies upon which the interpleader juisdiction was premised. The interveners offered no evidence, and made no attempt to show any plausible theory upon which the federal court had jurisdiction to afford them relief. The petitioner here in the most positive and unequivocal terms possible, and by pleadings expressly denied all claims of Aetna and interpleaders for relief in the federal court, as a matter of law, and with equal positiveness denied any factual basis for such relief.*

With the record in this situation, the district court, without trial, evidence, findings of fact or conclusions of law, and without attempting to determine the issues raised in cause No. 87,402 disposed of the state court action as to all parties by a permanent injunction preventing further prosecution of the suit by or against any party thereto.

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* For transcript of pre-trial record so showing and decrees entered in district court, see Appendix, pages 43-61.

Assuredly there is no presumption that interveners in a federal court are entitled to injunctive relief where neither pleadings, evidence, findings of fact or conclusions of law even remotely tends to sustain their right to an injunction.

The United States Court of Appeals incorporates in its opinion extensive recitations respecting issues of fact and law which were alien to the record and disregards such obvious facts that under the pleadings the sole issue for determination in the federal court was whether entry of two injunctions against prosecution by this petitioner, among others, of cause No. 87,402 was in all the circumstances within the jurisdiction of the federal court.

The statement that "the court has the power to compel the parties to agree to all facts concerning which there can be no real issue," disregards the record and ignores the right of litigants to a trial of issues. The district court made no order at any time attempting "to compel the parties to agree" to any facts.

The issue in cause No. 87,402 remain undisposed of in a state court. There has been no trial of the case.

It's difficult to escape the conclusion that unless this court intervenes, a means has been discovered whereby tort-feasors may escape consequences of their fraudulent acts without so much as swearing a witness in any court through the simple process of filing a denominated interpleader suit in a federal court and obtaining a summary injunction.

The proceedings in the federal court creates unseemly conflict between state and federal courts for as stated the state court suit remains pending undisposed of on the dockets.

Federal courts, and particularly courts of equity, should not be used as a refuge and hiding place for protection of wrongdoers.

Certiorari is warranted to confine jurisdiction of federal courts to the limits prescribed by law under the rules announced in the cases of:

Mansfield, etc., R. Co. v. *Swan*, (Ohio, 1884) 111 U. S. 379, (4 S. Ct. 510, 28 L. Ed. 462);

King Iron Bridge, etc., Co. v. *Otoe County*, (Neb. 1887) 120 U. S. 225 (7 S. Ct. 552, 30 L. Ed. 623);

Cameron v. *Hodges*, (Tenn. 1888) 127 U. S. 322 (8 S. Ct. 1154, 32 L. Ed. 132) • • •.

Parker v. *Ormsby*, (Neb. 1891) 11 S. Ct. 924, 141 U. S. 81, 35 L. Ed. 654.

Absence of federal jurisdiction to dispose of pending state court case 87,402 by an injunction in all the circumstances appears so obvious that this Court under the rule announced in *King Iron Bridge, etc., Co.* v. *Otoe County supra*, is authorized to deny jurisdiction of the court from which the record comes, of its own motion.

D. Constitutional and Statutory Provisions Involved.

The United States District Court for the Northern District of Oklahoma entered judgment in both cases without trial and filed and entered no findings of fact or conclusions of law.

This constituted a violation of *U. S. Const. Amend. V*, which so far as material reads

> "No person shall be * * * deprived of * * * property without due process of law * * *."[6]

And that court further disregarded Art. 3, Sec. 2, cl. 1, of the U. S. Const. relating to the judicial power of the federal court which reads

> "The judicial power shall extend * * * to controversies * * * between citizens of different states * * *."[7]

28 U. S. C. A. 1397 dealing with interpleader, reads:

> "Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be bought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936."

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[6] U. S. Const., Amend. V, in full reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[7] Art. 3, Sec. 2, cl. 1, in full reads:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United tates shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Related to the foregoing statutes is 28 U.S.C. A. 1332, governing federal jurisdiction, which vests such jurisdiction in the following words:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between
>
> (1) Citizens of different States;
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> (b) The word "States," as used in this section, includes the Territories and the District of Columbia. June 25, 1948, c. 648, 62 Stat. 930."

To sustain the injunctions, the Court of Appeals premised its conclusions upon the clear language of 28 U.S.C.A. 2361, which the Opinion asserts "authorizes the permanent injunction in an interpleader matter."[8]

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[8] The federal statute referred to is quoted in full as follows:

"Sec. 2361. *Process and Procedure.* In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970; amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

The Court of Appeals found federal jurisdiction vested under 28 U. S. C. 1335.*9

The Circuit Court disregarded 28 U.S.C.A. 2283, expressly limiting federal jurisdiction to enjoin proceedings in a State court This statute reads:

> STAY OF STATE COURT PROCEEDINGS — 28 U.S.C.A. 2283.
>
> "A court of the United States *may not grant an injunction to stay proceedings in a state court* except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." June 25, 1948, c. 646, 62 Stat. 968. (Emphasis supplied.)

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*9. "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate policy of insurance, or other instrument of value or amount of 500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931."

Related to the foregoing sections of U.S.C.A. is *Rule 22 Federal Rules of Civil Procedure.*[*10]

Where lower federal courts have entertained suits of which they have no jurisdiction as federal courts, the jurisdiction of the Supreme Court on certiorari is to correct their errors in assuming jurisdiction. *Lion Bonding, etc., Co.* v. *Karatz,* (1923) 43 S. Ct. 641, 262 U. S. 640, 67 L. Ed. 1151.

An important federal constitutional question justifies certiorari. *In re Murchison,* U. S. Mich. 1955, 75 S. Ct. 623, 349 U. S. 133, 99 L. Ed. 942.

There are special and important reasons authorizing certiorari, reaching constitutional dimensions in the case at bar within the rule set forth in *Rice* v. *Sioux City Memorial Park Cemetery,* U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897.

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*10. "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joineder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or, that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joined of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, effective Oct. 20, 1949."

"It is the duty of the Supreme Court to ascertain from the record whether the court below could properly take jurisdiction." *Great Southern Fire Proof Hotel Co.* v. *Jones,* (Ohio) 20 S. Ct. 690, 177 U. S. 449, 44 L. Ed. 842.

For the reasons stated, it is respectfully submitted that the writ of certiorari should issue.

Respectfully,

GLENN O. YOUNG,
Sapulpa, Oklahoma
Attorney for Petitioner

Glenn A. Young,
David Young, and
John W. Young,
All of Sapulpa, Oklahoma,
of Counsel.

APPENDIX

Exhibit 1.

Opinion of the United States Court of Appeals,

Filed United States Court of Appeals, Tenth Circuit, May 12, 1958. Robert B. Cartwright, Clerk.

United States Court of Appeals, Tenth Circuit.
May Term 1958.

No. 5620

LEONA HOLCOMB, individually; LEONA HOLCOMB, as Guardian of the person of DONALD GEORGE FLEMING, a minor; DONALD GEORGE FLEMING, a minor; FRANK T. DENHAM; MAY CECILIA RENHAM; DOROTHY LEE DENHAM, a minor; CAROLYN DENHAM LUMLEY; MAY CECILIA DENHAM as Guardian of DOROTHY LEE DENHAM, a minor; GEORGE DENHAM; CLARENCE DENHAM; MARY JANE HOPKINS, nee Wright; and MARY ELLEN CASH, *Appellants,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation; FRANCIS X. RETTENMEYER, Executor of the Estate of JOSEPH A. RETTENMEYER, deceased; F. E. PENCE; VIRGIL F. SPRANKLE; GROVER D. STROTHER; A. N. MURPHY; JUSTIN W. FAHERTY and FIRST NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, *Appellees.*

No. 5621

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB as Guardian; MARY JANE HOPKINS; FRANK T. DENHAM; MAY CECILIA DENHAM; DOROTHY LEE DENHAM, a minor; CAROLYN DENHAM LUMLEY; MAY CECILIA DENHAM as Guardian of DOROTHY LEE DENHAM, a minor; GEORGE DENHAM; CLARENCE DENHAM and LEONA HOLCOMB, individually, *Appellants*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, and F. E. PENCE, *Appellees*.

Appeals From The United States District Court For The Northern District of Oklahoma

Glenn O. Young (John W. Young, David Young and Glenn A. Young were with him on the brief) for Appellants.

Robert J. Woolsey (J. C. Farmer, Otho Flippo and J. B. Bailey of Farmer, Woolsey, Flippo & Bailey were with him on the brief) for Appellee Aetna Life Insurance Company.

Philip M. Landa for Appellee, F. E. Pence.

Sam T. Allen III (Moraul Bosonetto was with him on the brief) for Appellee, Francis X. Rettenmeyer.

Joe Sharp and Robert D. Looney (Bryan W. Tabor of Rucker, Tabor & Cox; Robert D. Hudson of Hudson, Hudson & Wheaton; Looney, Watts, Looney & Nichols; and Joseph Rucks of Cochran, Dudley, Fowler, Rucks, Baker & Jopling, were with him on the brief) for Appellees First National Bank and Trust Company, et al.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

Appellants have been subjected to an adverse judgment rendered summarily after pre-trial w ich judgment includes a permanent injunction prohibiting 'em from further prosecution of asserted claims against appellees now pending or potential in the state courts of Oklahoma. The instant action is one of interpleader and its nature premises the trial court's ruling that the federal court provides the proper forum for the determination of the various issues interwoven through the claims of all the parties. Upon appellants' failure and refusal at pre-trial to tender those issues asserted by them against appellees in a pending state court suit the trial court took its summary action.

Aetna Life Insurance Company instituted this action in interpleader by filing a complaint in the District Court for the Northern District of Oklahoma alleging that the company had entered into a single premium annuity contract with Rosa B. Wright Rettenmeyer during her lifetime; that Mrs. Rettenmeyer had since died and that by the terms of the contract the company was then obligated to pay the continuing benefits to the contingent beneficiaries named in the agreement that the beneficiaries asserted such contract rights to be valid and binding upon the company; that certain of the heirs[1] of Mrs. Rettenmeyer had by the instigation of an action in the state courts of

1. Since this litigation has been in progress since 1954 changes in named parties plaintiff and defendant in various actions have been necessitated by death and successions; some actions instituted in the Oklahoma state courts have been dismissed, others initiated. We do not consider it necessary to detail the transition of parties and actions nor to refer to the parties by name except in occasional instances. Appellants claim as heirs of Mrs. Rettenmeyer and will be referred to as such.

Oklahoma *attacked the validity of the annuity contract* and were asserting the claim that Aetna, acting in concert with others, had through fraud and connivance practiced upon Mrs. Rettenmeyer converted certain of Mrs. Rettenmeyer's funds constituting the *equivalent of the premium payments received by Aetna.* Pointing to the existence of but a single liability but the possibility of being required, if separate suits prevailed, to disgorge the consideration of the *annuity contract* yet pay its benefits, Aetna named the heirs of Mrs. Rettenmeyer and the beneficiaries of the contract as defendants and sought relief in interpleader. The trial court issued a temporary injunction prohibiting the defendants from initiating or prosecuting any action against Aetna which touched the subject matter of the complaint in interpleader. The validity of this action of the trial court together with concomitant jurisdictional questions was tested and upheld by earlier appeal to this court, 228 F. 2d 75, wherein it was held that the controversy presented "justiciable questions appropriate for determination in an action in the nature of interpleader" and "questions which cannot be adjudicated with finality and conclusiveness as to all parties in interest in either of the cases pending in the state courts." Certiorari to the United States Supreme Court was denied, 76 S. Ct. 473, and the cause was returned to the District Court for further proceedings.

Subsequent to this remand, Aetna *filed its complaint* in the companion case here under consideration, alleging

substantially the same bases for interpleader as to an endowment contract *bought at the same* time by *Mrs. Rettenmeyer* upon the life of Donald George Fleming. It was asserted that the balance of the proceeds from the purportedly converted bonds paid the premium upon this policy. The issues before the trial court and before this court are controlled by *virtually the same facts* and the *same law* and require no separate discussion.

Timely petitions for leave to intervene were filed by those persons other than Aetna who appellants asserted had participated in the conversion of Mrs. Rennenmeyer's bonds. Leave was accordingly granted and those parties are now included as present appellees.[2]

Notwithstanding the earlier holding of this court as expressed in the opinion of Chief Judge Bratton, *supra*, that a justicable issue in federal interpleader existed as to "whether or not Aetna should be required to part with the premiums received by them for the annuity contract because of a conversion of Mrs. Rettenmeyer's bonds as asserted by appellants in the state court action, *appellants refused to tender this issue at the pre-trial conference*. To the contrary, counsel for appellants expressly stated that no claim was made relative to the obligation of Aetna under the contracts in opposition to payment to the beneficiaries' in accord with the contract terms. The trial court, after careful explanation of the posture of the case and

2. Some but not all of the appellant heirs are also beneficiaries of the annuity contract.

the consequence of the position adopted by the parties, found that no issue of fact existed which was determinative of the issues properly present in the interpleader and rendered summary judgment accordingly. To support the summary disposition of the controversy the trial court expressly found the uncontroverted (in law) fact to be that the property asserted by appellants to have been converted by Aetna from the lifetime estate of Mrs. Rettenmeyer was the same property received by Aetna as consideration for its contracts. In this regard appellants now question first the power of the court to determine a question of fact at pre-trial and second the validity of the particular finding that the proceeds of the bonds allegedly converted paid the premium on the insurance policies. This question is vital to the determination of whether interpleader will lie as it must necessarily settle the issue of whether the conversion alleged in the state court action is sufficiently related to the contracts before the court to constitute a single transaction giving rise to a single liability.

The prior appeal of this case recognized that this issue was before the court to be determined on trial as to the annuity policy. As to the endowment policy, the complaint states ,

> "Plaintiff alleges further that its liabilities under said policy or its transactions with Rosa B. Wright Rettenmeyer can be fully determined and decided upon the issues presented by its complaint for declaratory judgment avoiding a multiplicity of suits for the reason that should the guardian of Donald George Fleming and the defendants other than Donald George

Fleming prevail in the action and recover the monies paid for the premium by Rosa B. Wright Rettenmeyer, still the plaintiff might be faced with a suit by Donald George Fleming to enforce the contract of insurance . . ."

The issue before the court was precisely the one giving rise to an interpleader action and its determination cannot be circumvented by a *refusal on the part of a party to offer any evidence.*

The purpose of pre-trial conferences is to simplify the issues and eliminate waste of time and money by avoiding unnecessary proof of facts at the trial. *McDonald* v. *Bowles* (9 Cir.) 152 F. 2d 741. Where at pre-trial admissions and pleadings show that no issue of fact remains to be determined, the court has the power to decide the questions of law and enter summary judgment thereon, 22 A.L.R. 2d 609.

A pre-trial conference is more than a mere conference at which the court seeks to eliminate groundless allegations or denials and the court has the power to compel the parties to agree to all facts concerning which there can be no real issue. *Berger* v. *Brannan* (10 Cir.) 172 F. 2d 241, certiorari denied 337, U. S. 941; *McDonald* v. *Bowles*, *supra*. In the Berger case, the plaintiff had prepared a statement of sales and prices; the defendant urged that portions were omitted but failed to show wherein the statement was faulty; the trial court entered summary judgment, treating the plaintiff's statement as true. In affirming the judgment of the lower court, this court stated:

"Since the only issue between the parties was what material data was recorded on appellant's books

and since appellee had alleged that his Exhibit 'A' correctly reflected all pertinent data, the court was not required to stand by, permit appellant to rest on its general denial and await the outcome of a long expensive trial, to see whether such a denial was sustained."

In the present case, Aetna alleged in its amendment to its complaint for interpleader:

"That the annuity contract mentioned in its original complaint, No. AN 33409 . . . was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in paragraph 13 of the amended petition filed by Leona Holcomb, et al. in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff Leona Holcomb, et al. in Case No. 29092."

Intervenor F. E. Pence, the policy-writing agent of Aetna, alleged:

". . . The said bonds were converted into cash and the cash proceeds deposited in the First National Bank and Trust Company of Oklahoma City to the account of Rosa B. Wright Rettenmeyer. Thereafter, Joseph A. Rettenmeyer, under the power of attorney granted to him by Rosa B. Wright Rettenmeyer, drew a check or checks upon the account of Rosa B. Wright Rettenmeyer in payment of the premium or premiums on the Aetna Life Insurance Company annuity contract and insurance policy on the life of Donald George Fleming . . ."

To these complaints general denials were entered but throughout the proceedings *the fact that the proceeds of the bonds had been used to purchase the policies was apparently recognized by counsel on both sides.*

The state court action against Aetna was based on the theory of a principal's liability for its agent's acts and that complaint specifically alleges that F. E. Pence was acting within the scope of his employment.

Attorneys for Aetna offered to show the receipt of the money from the proceeds of the bonds and the payment of the premium in the account books of the Rosa B. Wright Rettenmeyer estate. Counsel for the defendants were willing to stipulate to what the record books would show.

Other statements by defendants' attorneys indicate that they *had no other theory of conversion than that Aetna had wrongfuly accepted payment for insurance policies:*

> ". . . let it suffice to say that we have filed suit in the District Court of Creek County, Oklahoma. Originally the suit was filed for conversion by fraud for damages for the taking of the money that ultimately wound up in what they refer to generally heretofore in this litigation as the big policy. That is, this policy with the $162,000 single premium."

And again:

> "They take those bonds that are non-negotiable and then have Mr. Pence execute a form whereby he purports to authorize exchange of those bonds for negotiable bonds, some that can be exchanged, and having exchanged the non-negotiable bonds for cash, and deposited that to her credit in the bank."

Despite all of these indications that *the suit in the state court was premised on a fraudulently executed insurance contract*, defendants' counsel insisted, when pressed by the court as to their position that "We don't know

what the Aetna did with the money. We say that Aetna's general agent went into this safety deposit box, and took the bonds—."

Under the circumstances, the trial court was justified in making the finding that the conversion complained of in the state court was an attack on the validity of the contract and a proper matter to be determined by an action in interpleader, in accord with the rule of *Berger* v. *Brannan*, *supra*.

Appellants had a second chance to defeat the interpleader action by showing that the money was actually converted by Aetna and the other defendants in the state court action and that Aetna's admission of the amount due under the contract was given in bad faith in order to avert liability for a greater amount as damages in conversion. Instead, however, they insisted on the validity of the contract in order to preserve its benefits to those of their number who were beneficiaries under the policies.

"If the consideration was wrongfully obtained, there was no meeting of the minds, the contract fails, and the estate of the promissee may seek rescission of the contract and any damages occasioned by the wrongful act of fraud or conversion. On the other hand, the estate may not contend that the contract is valid for the purposes of enforcement and assert at the same time that the vital part of the contract, the consideration, was not the bargained for price of the promise.

In all, appellants set forth *thirty-one assignments of error* many of which renew arguments considered upon the

first appeal and many of which appear to be *rejections of established law.* Although we have considered each such assignment we find no substance to the arguments advanced and *they merit little discussion.* Appellants, for example, would have us find fraud as a matter of law from the facts that Mrs. Rettenmeyer's will and ante nuptial contract evidence an intent to limit her bequest to her husband, whereas subsequently an annuity contract was obtained providing him with an income for life at a premium amounting to that which will ultimately be returned under the contract. Here again, appellants have ratified the contract by insisting that it is valid and enforceable.

Relying upon a single case, *Louther* v. *New York Life Ins. Co.* (3 Cir.) 278 F. 405, appellants urge that a court may not permanently enjoin a prior state court suit in an interpleader action. Suffice it to say that case interpreted law in effect in 1922 and the clear language of *28 U.S.C.A. 5361* authorizes the permanent injunction in an interpleader matter.

Appellants' complaints anent the lack of diversity jurisdiction apparently relate to the fact that the state court action involving the same parties could not be removed since Oklahoma residents were both parties defendant and plaintiff. Plaintiff Aetna brought its complaint in interpleader against claimants of diverse citizenship as required by 28 U.S.C.A. *1335.* All adverse claimants to the fund before the court in an interpleader suit need not be of diverse citizenship and *it is sufficient if the citizenship of more than one state is represented among the defendants.*

United States, et. al v. *Sentinel Fire Ins. Co.* (5 Cir.) 178 F. 2d 217. Further more, the permissive intervention of Oklahoma residents as parties will not divest the court of interpleader jurisdiction previously acquired. *Wichita P. & Light Co.* v. *Public Utilities Comm.*, 260 U. S. 48, S. Ct. 51, 67 L. Ed. 124.

Although the intervenors were not necessary parties to the interpleader action, the question of whether or not there had been a conversion of Mrs. Rettenmeyer's bonds by them was governed by the same facts and law determining Aetna's liability and the court properly allowed them to intervene, Federal Rules of Civil Procedure, Rule 24 (b) (2).

Affirmed.

APPENDIX.

Exhibit 2.

Federal Rules of Civil Procedure, Rule 16, 28 U. S. C. A.

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleading;

(3) The posibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action, at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

APPENDIX.

Exhibit 3.

Petition Filed in District Court, Tulsa County, Okla. (R. R. 32) *Holcomb, et al., vs. Aetna Life Insurance Company, et al.*, No. 87,402. (Filed April 15, 1954).

Come now the plaintiffs Mary Jane Hopkins, nee Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, and for cause of action against the defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, in person and as guardian, agent, and attorney in fact for Rosa B. Wright, later Rettenmeyer, deceased, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, a corporation, as such and as Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, and its officers and agents, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty, allege and state:

I. The plaintiff Mary Jane Hopkins, nee Wright, is the daughter of the said Rosa B. Wright (later Rettenmeyer). That plaintiffs Leona Holcomb, nee Denham, Ed, Frank, George and Clarence Denham were brought up in the home of the late Rosa B. Wright (later Rettenmeyer) and her husband, the late Cal Wright, both of whom are deceased. Rosa B. Wright was their aunt and foster mother. Donald George Fleming, a minor, is the ward of said Rosa B. Wright and her grand nephew. Said plaintiffs

hereinafter referred to as The Denham Heirs are all devisees under the Last Will and Testament of Rosa B. Wright Rettenmeyer, deceased, attached hereto and made a part hereof as "Exhibit A."

II. The defendant, The First National Bank and Trust Company of Oklahoma City, is a corporation duly organized and existing as such under the laws of the State of Oklahoma, engaged in general banking and in business as trustee and custodian for hire of the property of others, including the public generally. Said The First National Bank and Trust Company of Oklahoma City, in addition to its activities hereinabove recited, advertises for business as and represents itself to be specially qualfied to serve as administrator of the estate of deceased persons and executor of their wills. For the purpose of obtaining business of this character it retains and employs attorneys and agents who solicit and attempt to obtain for it appointments involving fidelity and trust as executors and administrators. At all times hereinafter complained of, said defendant The First National Bank and Trust Company of Oklahoma City was the duly designated Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, under the terms and conditions of her said Last Will and Testament. Subsequent to the death of Rosa B. Wright Rettenmeyer, said The First National Bank and Trust Company of Oklahoma City was by order of the County Court of Creek County, Oklahoma, in a proceeding therein instituted by it, designated and appointed executor of the will of said Rosa B. Wright Rettenmeyer, deceased,

which position of trust said corporation now occupies. A copy of said Letters Testamentary are hereto attached as a part hereof and marked "Exhibit B."

III. The defendants Virgil F. Sprankle, Grover D. Strother,, A. N. Murphey and Justin W. Faherty, were at all times hereinafter complained of officers and agents of said The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such and as the designated Executor of the Estate of Rosa B. Wright, later Rettenmeyer, deceased; that they were at all times herein referred to acting within the scope of their employment as such officers and agents and their acts were the acts of said corporation, The First National Bank and Trust Company of Oklahoma City.

IV. That at all times hereinafter complained of one Joseph A. Rettenmeyer was the second husband, attorney in fact, agent and/or guardian of the aforesaid Rosa B. Wright (later Rettenmeyer) and a devisee under the terms of her aforesaid Last Will and Testament to the extent of an undivided one-eleventh interest in her estate. Said Joseph A. Rettenmeyer was the step-father of plaintiff Mary Jane Hopkins, nee Wright. At all times hereinafter complained of and in committing the torts and converting the property hereinafter set forth, said Joseph A. Rettenmeyer acted in his own behalf and in behalf of and for his own children by another marriage, defendants Francis X. Rettenmeyer and Raymond Rettenmeyer, and his daughter-in-law defendant Marion Rettenmeyer; and said last named three defendants at all such times acted by and through said Joseph A. Rettenmeyer.

Copies of the three powers of attorney and the Letters of Guardianship under and behind which said defendant Joseph A. Rettenmeyer so acted and converted the property of said Rosa B. Wright are attached hereto as a part hereof and marked "Exhibits C. D. E, and F," respectively.

V. That the defendant Aetna Life Insurance Company is a foreign insurance company, duly incorporated as such and engaged in business in the State of Oklahoma. That the defendant F. E. Pence is and was at all times hereinafter complained of an agent of said Aetna Life Insurance Company, occupying a position as General Agent of said company within and for the State of Oklahoma and acting within the terms and scope of his agency as such that said F. E. Pence has long posed as a personal friend and private counsellor to said Rosa B. Wright (later Rettenmeyer).

VII. Plaintiffs aver further that upon the death of her first husband, the aforesaid Cal Wright, his widow, the aforesaid Rosa B. Wright (later Rettenmeyer) inherited under the terms if his Last Will and Testament an estate having a value in exess of $800,000.00. At about the time said estate was distributed to her, the defendant Joseph A. Rettenmeyer proposed to marry her; that since the said Joseph A. Rettenmeyer was then about 68 years old and the said Rosa B. Wright was then herself about to be her property rather than her affections, required said 67 years, she, the said Rosa B. Wright, fearing his object Joseph A. Rettenmeyer to make and execute an ante-nuptial

agreement, a true and correct copy of which is hereto annexed and made a part hereof as "Exhibit G," under and by virtue of the terms of which he solemnly and legally renounced and waived any claims to her property and estate growing out of or resulting from said marriage; that she thereafter made and executed in due form the Will heretofore set forth as Exhibit A, making ample provision for the said Joseph A. Rettenmeyer in the event of her death by devising to him as aforesaid an undivided one-eleventh of her estate, and devising to plaintiffs a just and equitable portion thereof, all as is more particularly set forth under the terms of said Will; plaintiffs further allege that certain codicils were thereafter executed to said Will, the same being identified as Exhibits H and I and made a part hereof. That neither of said codicils altered or modified the proportionate share and part of said estate devised to each devisee.

VIII. That subsequent to the execution of said antenuptial agreement and said Will and said codicils, and prior to her death, the said Rosa B. Wright(later Rettenmeyer) became incompetent and incapable as the result of weakness of mind and body of seeing after and attending to her own property and affairs; that as the result thereof she was obliged to and did make and execute in favor of said Joseph A. Rettenmeyer certain Powers of Attorney, copies of which are heretofore appended as Exhibits C, D and E, under and by virtue of the terms of which she turned over and delivered to him, subject to the limita-

tions and restrictions therein set forth, control of her property and estate; that thereafter on or about the 30th day of July, 1952, said Joseph A. Rettenmeyer instituted in the County Court of Creek County, Oklahoma, a proceeding to have said Rosa B. Wright (Rettenmeyer) adjudged incompetent, and to have himself made guardian of her person and estate; that a copy of the petition therein is hereto appended as a part hereof as Exhibit J; that under an order of the County Court of Creek County, a copy of which is hereto appended and made part hereof as Exhibit K, he was designated and appointed her guardian, and as such assumed direction and control over her person under Letters of Guardianship, a copy of which is appended as a part hereof as Exhibit F.

IX. Plaintiffs allege further that said ante-nuptial agreement and said Will and all codicils thereto were prepared by or under the directon of an attorney, to-wit, John Emby, who was attorney for the late Rosa B. Wright (later Rettenmeyer), and in whom she reposed special confidence and trust, and by members of the law firm with which he was associated, that is to say, the law firm of Embry, Johnson, Crowe, Tolbert and Boxley; plaintiffs further say that said attorneys and said law firm were attorneys also for defendant Aetna Life Insurance Company, F. E. enie and Joseph A. Rettenmeyer as agent of Rosa B. Wright (later Rettenmeyer) under the terms of the agency hereinabove referred to.

X. Plaintiffs say further that at the time of the appointment of said Joseph A. Rettenmeyer as Attorney in

Fact, agent and custodian of her property aforesaid, said Rosa B. Wright (later Rettenmeyer) owned and held U. S. Government Bonds, more particularly described as follows:

U. S. Treasury bonds 2 7/8ths-1955-1960	
No. 10065 E	$10,000.00
No. 10066 F	$10,000.00
No. 10067 H	$10,000.00
No. 10068 J	$10,000.00
No. 10069 K	$10,000.00
No. 10070 L	$10,000.00
No. 10071 A	$10,000.00
No. 10072 B	$10,000.00
No. 10073 C	$10,000.00
No. 10074 D	$10,000.00
No. 10075 E	$10,000.00
No. 10076 F	$10,000.00
No. 8730 L	$ 5,000.00
Series G June, 1944:	
No. X448354 G	$10,000.00
No. X448355 G	$10,000.00
No. X448356 G	$10,000.00
No. X448357 G	$10,000.00
No. X448358 G	$10,000.00
No. X448359 G	$10,000.00

Said bonds had been by her entrusted to the care and custody of the defendant The First National Bank and Trust Company, a corporation, and its officers and agents, defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, both in the capacity of

trustees for hire and as the designated Executor of the Will of said decedent Said bonds had a market value of $191,864.64, and were producing interest, which ws accruing to her use and benefit in the sum of $8,687.50 per year.

XI. Plaintiffs aver and allege that under the terms of the Will of the late Rosa B. Wright (later Rettenmeyer) and said Ante-Nuptial agreement hereinabove referred to, in the event of the death of the said Rosa B. Wright said bonds, or the value thereof, together with any unexpended portion of the increments and the profits therefrom, would have been divided one-eleventh to Joseph A. Rettenmeyer and seven-elevenths to the plaintiffs herein, onformable to the terms of the Will and codicils hereinabove referred to. Plaintiffs aver and state that all said defendants and the attorneys hereinabove referred to were fully informed of the facts and circumstances herein set forth.

XII. It was the duty of each of the defendants hereinabove named to preserve intact and with fidelity and care said property and the income and increment therefrom for the use and benefit of said Rosa B. Wright (later Rettenmeyer) in her lifetime and for disposition conformable to the terms of said antenuptial contract, her Last Will and Testament and the codicils thereto in event of her death.

XIII. Plaintiffs further say that in breach of trust and violation of law said defendants, acting jointly and severally and in furtherance of a common design and purpose, did on or about the 31st day of October, 1950, secretly and surreptitiously enter the safety deposit box of said

Rosa B. Wright in The First National Bank and Trust Company of Oklahoma City, and without authority of law wrongfully and illegally take, steal and carry away therefrom the U. S. Government Bonds hereinabove set forth and did wrongfully endorse, or cause to be endorsed thereon, an "X" pupporting to be an act of said Rosa B. Wright Rettenmeyer, procure the cash value thereof, and convert the same to their own use and benefit to the damage and detriment of said Rosa B. Wright Rettenmeyer, her heirs, devisees and assigns, in the sum of $191,864.64.

XIV. Plaintiffs aver further that sad acts were done surreptitiously and secretly; that the knowledge of said transactions was secreted from said Rosa B. Wright Rettenmeyer in her life time; that if she had any notice or knowledge thereof, which is by plaintiffs specifically denied, she was so kept, controlled and dominated by the defendants, their agents and servants, and so incapacitated in mind and body and incapable by virtue of guardianship Powers of Attorney, and secret control of her own attorneys by said defendants that she was powerless to act in her own behalf.

XV. Plaintffs aver and allege that said Rosa B. Wright Rettenmeyer departed this life on or about the 13th day of December, 1952. Thereafter the defendant, The First National Bank and Trust Company of Oklahoma City, Oklahoma, a corporation, by said law firm of Embry, Crowe Tobert, Boxey and Johnson, immediatey instituted a proceeding for the appointment of said defendant bank as executor of said estate; that by virtue of the collusion of said

defendants hereinabove named, and each of them, in the wrongs hereinabove complained of and their interst therein, said defendant The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such, and as Executor of the Estate of said Rosa B. Wright Rettenmeyer, and its attorneys, have failed and refused and continue to fail and refuse to institute and prosecute a suit of any kind or character for the recovery of said assets of said estate and increment or profit or any part thereof; that on the contrary, they conspired together to conceal and secret the true facts respecting the conversion of said property and assets. Plaintiffs, although diligently endeavoring so to do, were unable to discover the facts hereinabove set forth until less than one year prior to the day and date of instituting this proceeding.

XVI. Plaintiffs further allege that the defendant Joseph A. Rettenmeyer has repudiated and breached the terms of the Will and codcils thereto of said Rosa B. Wright (later Rettenmeyer) by virtue of which act and conduct he has forfeited all rights vested in him and those claiming by, through or under him in or to any part or portion of the estate of said deceased, including specifically the moneys and property hereinabove referred to and the claims asserted hereunder.

XVII. Plaintiffs further assert that by virtue of the wrongs herein complained of they as devisees and heirs under the Will and codicils of said Rosa B. Wright (later Rettenmeyer) have suffered and sustained damages in the sum of $191,864.64 together with interest at the rate of 6% per annum thereon from the date of said converson to

this date in the further sum of $39,487.30; that said damages resulted from the fraud, oppression and malice of defendants by virtue of which plaintiffs are entitled to exemplary and punitive damages in the further sum of $231,351.94.

Wherefore, premises considered, plaintiffs bring this suit and pray judgment against said defendants and each of them jointly and severally and in favor of plaintiffs and said estate of Rosa B. Wrght (later Rettenmeyer) deceased, as their respective interests appear, for the sum of $231,351.94, together with interest thereon at 6% per annum until paid, as actual damages ,and for the further sum of $231,351.94 as exemplary and punitive damages, together with all costs of this action.

Young, Young & Young
By (s) Glenn A. Young
Attorneys for Plaintffs
George Denham, Clarence Denham and Mary Jane Hopkins, nee Wright.

H. K. Glunt and Young, Young & Young.
By: (s) Glenn A. Young,
H. K. Glunt.
Attorneys for Plaintiffs Leona Holcomb, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, and Frank Denham.

Attorneys Lien Claimed Young, Young & Young and H. K. Glunt.

APPENDIX.

Exhibit 4.

For copy of application for insurance policy see reproduction at end of appendix.

APPENDIX.

Exhibit 5.

Material Excerpts from Pre-Trial Conference.

(Record, pages 141-144.)

Aetna Life Insurance Co., et al., v. *Fleming, et al.*

Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?

The Court: Yes, I think I am.

Mr. Glenn O. Young: And specifically denied it?

The Court: I think I am aware of that.

Mr. Glenn O. Young: I want Your Honor to understand now, if there is an doubt about it, so the record may be clear, that we contest every statement that Mr. Aetna —Mr. Woolsey has made in his opening statement to this Court—we contest them all.

The Court: Do you take the position that the burden is on you under the state of these pleadings to affirmatively establish the circumstances under which these bonds were cashed and the proceeds used?

Mr. Woolsey: Not now, Your Honor, in view of the fact of what Mr. Young has stated, that none of the heirs, or none of the Denhams, or none of the beneficiaries of the policies—either policy takes the position that the contracts

are invalid; in other words, my position now is simply this: You can't eat your cake and have it too. That either the contracts are valid or they are invalid. If they are valid, Aetna can retain the premiums. You have gotten now from a statement of counsel a ratification by the Denham heirs of these contracts under the same—they now assert in this Court that they stand ready, willing and able to receive their part of the money. They don't claim it, but they say that they are willing to accept it, and therefore they are in no better position than Rosa B.—

The Court: I don't believe there is anything left to try; I think this case is now ripe for entry of judgment.

Mr. Woolsey: I am inclined to agree with Your Honor. It is a proposition that—they have ratified the contract by their statement, and I tender in open court payment of both the amount due under these contracts, and annuities, to the Denham heirs, together with accrued interest—I tender it in open court.

The Court: All right, I am going to enter judgment accordingly in both cases on both contracts, of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay to Fleming in accordance with the terms thereof, or to the beneficiaries in accordance with the terms thereof, and I believe the only—Donald George Fleming is the——

Mr. Woolsey: He is the beneficiary.

The Court: Beneficiary under the contract.

Mr. Glenn O. Young: Under the Donald George Fleming contract we would like a special finding that that contract was applied for by Donald George Fleming, a minor, and that the name of Rosa B. Wright Rettenmeyer does not appear on either the application or the policy.

Mr. Landa: Yes, it does.

Mr. Glenn O. Young: That is her name——

The Court I don't think it necessary to make any special finding on that proposition.

Mr Landa: The payment of that is according to its terms.

The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of res adjudicata

Mr. Glenn O. Young: Will Your Honor make a finding on the question of the jurisdiction of this Court in an action wherein interpleader—there is no diversity of citizenship as between the interpleaders and the parties defendant in that lawsuit.

The Court: You may prepare appropriate decree in accordance with the views indicated.

Mr. Woolsey: Very well.

The Court: That's all.

Mr. Allen: Your Honor, we would request a special finding on behalf of Joseph A. Rettenmeyer that at the time of the purchase of both of these annuities Rosa B. Wright Rettenmeyer was competent and fully capable to transact and manage her own affairs, and was in no way overreached or defrauded in these transactions.

The Court: That issue has not been tendered here. There is no occasion for me to make a finding——

Mr. Allen: If I understand then the Court refuses to make such a finding solely because no such issue has been tendered, is that correct?

The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and

the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time.

Mr. Allen: All right, Your Honor.

Mr. Glenn O. Young: Your Honor, let us save an exception on the record, both to refusal to make findings of fact on jurisdictional issues, and the refusal to make special findings of fact on the issues in controversy, and to the judgment of the Court as entered and the findings as made in the judgment.

The Court: This amendment to the answers of the defendants which you tendered for filing may be filed.

That's all.

Filed April 15, 1957.

Decree. (Case No. 3502)

Now, on this 10th day of December, 1956, the above cause of action came on for pre-trial hearing. The Plaintiff, Aetna Life Insurance Company, a corporation, appeared by Robert M. Woolsey and Thomas W. Brown of Farmer, Woolsey, Flippo & Bailey; its attorneys; the defendants, Leona Holcomb individually, Leona Holcomb as guardian of the person of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Gladys Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, appeared by H. K. Glass, Glenn O. Young, Glenn A. Young, and David Young, their attorneys; the defendants, George Denham, Clarence Denham, Mary Jane Hopkins nee Wright, and Mary Ellen Cash appeared by Glenn O. Young, Glenn A. Young and David

Young, their attorneys; Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, Louis Denham, Marion Denham, and Rufus Denham by Moraul Bosonetto, their attorneys; the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer deceased, appeared by Sam T. Allen III, his attorney; the intervenor F. E. Pence appeared by Philip N. Landa of the firm of Rhodes, Crowe, Hieronymus and Holloway, his attorneys; the intervenors Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty appeared by Joseph A. Sharp of the firm of Rucker ,Tabor & Cox of Tulsa, Oklahoma, but on behalf of the firm of Cochran, Dudley, Fowler, Rucks, Baker & Jopling of Oklahoma City; the intervenor First National Bank & Trust Company of Oklahoma City appeared by Joseph A. Sharp of the firm of Rucker, Tabor & Cox and by Ann Otter of the firm of Looney, Watts, Ross, Looney & Smith, its attorneys.

The Court Finds, having considered the statements of counsel, and the pleadings in said cause, as follows:

That the Plaintiff, Aetna Life Insurance Company, is a corporation and it was such a corporation at the time of filing the action, organized and existing under the laws of the State of Connecticut, and that it is duly authorized and licensed to transact insurance business in the State of Oklahoma and is a citizen of the State of Connecticut.

The Court Further Finds That the Defendants, Leona Holcomb individually, and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham,

George N. Denham, Leona Denham Holcomb and Mary Jane Hopkins at the time of the filing of this action were citzens and residents of the State of Oklahoma.

The Court Finds Further That Edward Denham at the time of the filing of the above action was a citizen and resident of the State of Oklahoma, but that he has since died and that his heirs are his widow, May Cecilia Denham, and his daughters, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, and that this action has heretofore been revived in the name of the heirs of Edward Denham.

The Court Further Finds That the Defendant Raymond D. Rettenmeyer is a citizen and resident of the State of New York and that the Defendant Francis X. Rettenmeyer is a citizen and resident of the State of New Jersey, and that the Defendant Marion Rettenmeyer is a citizen and resident of the State of Oregon.

The Court Further Finds That the Defendant Louis Denham is a citizen and resident of the State of Idaho and the Defendant Marion Denham is a citizen and resident of the State of Washington.

The Court Finds Further That in the Complaint for interpleader filed herein, it is alleged by the Plaintiff that the Defendant Rufus Denham is a citizen and resident of the State of Washington, which allegation is denied by certain of the Defendants as appears from the answers filed herein. The Court finds that under the appropriate acts of Congress pertaining to interpleader that the requisite diversity of citizenship exists and that this Court has

jurisdiction of the parties and the subject matter of the action and that this is an action in the nature of interpleader.

The Court Further Finds That on the 9th day of December, 1950, on application of the said Rosa B. Wright Rettenmeyer, the plaintiff made, executed and delivered its certain single premium annuity Contract No. AN33409 being the annuity contract heretofore referred to in the Plaintiff's Complaint in interpleader upon payment to it of funds of the said Rosa B. Wright Rettenmeyer in the sum of $162,606.00. That the Defendants, Mary Jane Hopkins nee Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, in Cause No. 87402, in their Amended Petition filed in the District Court of Tulsa County, State of Oklahoma, claim that certain United States Bonds as described in their Petition of a total face value of $185,000.00, and having a market value of $191,864.64, were converted by the Defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, Virgil F. Sprankle, Grover D. Strothers, A. N. Murphy and Justin W. Faherty.

The Court Further Finds from the pleadings that $162,606.00 of the proceeds of said bonds were used to pay the premium on Policy No. AN33409 above referred to.

The Court Further Finds That on or about the 27th day of October, 1950, the plaintiff made, executed and de-

livered a certain policy of insurance, No. N1669203 on the life of Donald George Fleming, which policy appears as an exhibit to Plaintiff's Complaint in Cause No. [illegible] filed in this Court, which policy provides for payment on the death of Donald George Fleming of the proceeds of the policy to Joseph A. Rettenmeyer, uncle of the insured, otherwise to Rosa B. Wright Rettenmeyer, aunt of the insured, if she survived the insured, otherwise to the Executors and Administrators of the insured as provided in the policy, and said policy was issued in exchange for the payment by Rosa B. Wright Rettenmeyer through Joseph Rettenmeyer as her attorney-in-fact of the sum of $25,143.03 premium paid out of the funds of Rosa B. Wright Rettenmyer obtained from the cashing of the bonds heretofore mentioned.

The Court Further Finds that the Defendants, Frank T. Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Leona Denham Holcomb as guardian of Donald George Fleming, Donald George Fleming, a minor, Mary Jane Hopins and the Defendant's heirs of Edward Denham, to-wit, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley and May Cecelia Denham as guardian of Dorothy Lee Denham, a minor, in their pleadings and in open court by their counsel, assert that they make no claim as to the invalidity of the annuity Contract No. AN33469 hereinafter referred to, and that they make no claim as to the invalidity of the insurance contract No. N1669203 hereinafter referred to, but state that said insurance contracts are now incon-

testable and are valid contracts and are due and payable and that said contracts should be paid according to their terms. And further that said Defendants, through their counsel, state that there was no controversy between anybody as to the issuance of the policy and that there is no conflict among the parties who are designated as annuitants as to which one receives what payments are due under the policies and that the identity of the beneficiaries under the policy is established and that none of said beneficiaries are contending that the policy is invalid and that they are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Rettenmeyer.

The Court Further Finds That said Defendants on request of the Court declined to assert any claim or tender any issue for conversion of the bonds in this cause and stated in open court that the Defendants' pleadings measured their claims in the United States Court accurately and carefully and thereon the Court, having considered all the pleadings heretofore filed and the statement of counsel, finds that there remains no issue of fact to be tried in the present case and that judgment should be rendered for the Plaintiff as hereinafter set forth.

Th Court Further Finds That none of the other beneficiaries who are Defendants in the above captioned cause make a claim that said policy or annuity contract is invalid.

The Court Further Finds That none of the Defendants assert or make any claim or tender any issue for the conversion of the bonds as alleged in the Petition attached as an exhibit in Cause No. 87042 in the District Court of Tulsa County, which cause of action is still pending in the District Court of Tulsa County.

The Court Further Finds That at the time of filing the Complaints in interpleader and the amendment thereto, the Defendants, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Louis Denham, Frank S. Rettenmeyer, Raymond D. Rettenmeyer, were claiming and in their answers filed herein claimed the payments due them as contingent beneficiaries under the annuity Contract No. AN33409, and that the claims for conversion of the bonds asserted in Cause No. 87042 and the claims for payments under the policy were conflicting and adverse and the plaintiff was unable to determine the validity of those claims and the rights of the claimants as between themselves, and the Plaintiff could not, without hazard to itself, undertake to decide as to the validity or superiority of the conflicting claims of the Defendants.

The Court Further Finds That Rosa B. Wright Rettenmeyer died on December 13, 1952, and that Joseph A. Rettenmeyer, contingent beneficiary, died on March 22, 1954, and that Aetna Life Insurance Company repaid under its annuity contract the sum of $39,060.00 to Rosa B. Wright Rettenmeyer to Joseph A. Rettenmeyer, attorney-in-fact for Rosa B. Wright Rettenmeyer, Guy L. Barry, guardian of the Estate of Rosa B. Wright Rettenmeyer, and

Joseph A. Rettenmeyer, all as beneficiaries or annuitants under said annuity contract, and that the contingent beneficiaries named in said policy who are defenders to the above captioned action are entitled to be paid pursuant to the terms of the policy payments from the first day of April, 1954.

The Court Further Finds That because of the conflicting claims of the parties the Plaintiff should not be compelled to determine the rights of the parties and that there was a danger that Plaintiff would have been involved in a multiplicity of suits and put to unnecessary costs and expenses on account of conflicting and adverse claims

The Court Further Finds That upon the institution of the above styled action the Plaintiff filed with the Clerk of this Court a bond to abide by the judgment of this Court which bond was approved by the Court.

It Is Therefore Ordered, Adjudged And Decreed That the Plaintiff herein have a judgment determining that the contract of annuity No. AN33409 is a valid annuity contract and that the proceeds of the contract should be paid to the Defendants named as beneficiares therein, namely Ellen Cash, Rufus Denham, Marion Denham, Louis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Frank T. Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins and the payment due Edward Denham be paid to his heirs May Cecilia Denham, his widow, and to May Cecilia Denham, guardian of Dorothy Lee Denham, a minor and to Carolyn Denham Lumley, said payments to be retroactive to April 1, 1954.

It Is Further Ordered, Adjudged And Decreed By The Court that the Defendants, Leona Holcomb individually, and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, be and they are hereby perpetually enjoined and restrained from making any further claims against the plaintiff and against the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, The First National Bank & Trust Company of Oklahoma City, F. E. Pence, Virgil Sprankle, Grover D. Strother, A. N. Murphy,and Justin W. F. herty, on account of the alleged conversion of the bonds mentioned in their Petition in Cause No. 87042 in the District Court of Tulsa County, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87042 in the District Court of Tulsa County against the Plaintiff, Aetna Life Insurance Company, and against the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, The First National Bank & Trust Company of Oklahoma City, F. E. Pence, Virgil Sprankle, Grover D. Strother, A. N. Murphy, and Justin W. Faherty.

Royce H. Savage, Judge

Filed Jan. 14, 1957.

Case No. 3503.

Journal Entry Of Declaratory Judgment.

Now, on this 10th day of December, 1956, the above cause of action came on for pre-trial hearing. The plaintiff, Aetna Life Insurance Company, a corporation, appeared by Robert J. Woolsey and Thomas W. Brown of Farmer, Woolsey, Flippo & Bailey, its attorneys; the defendants, Leona Holcomb individually, Leona Holcomb as guardian of the person of Donald George Fleming, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham a minor, appeared by H. K. Glunt, Glenn O. Young, Glenn A. Young, and David Young, their attorneys; and the defendants George Denham, Clarence Denham, Mary Jane Hopkins, appearing by Glenn O. Young, Glenn A. Young, and David Young, their attorneys, and the intervenor F. E. Pence appearing by Philip N. Landa of the firm of Rhodes, Crowe, Hieronymus & Holloway, his attorneys, the Court finds, having considered the statements of counsel and the pleadings in said cause as follows:

That the Plaintiff, Aetna Life Insurance Company, is a corporation and it was such a corporation at the time of filing the action, organized and existing under the laws of the State of Connecteut and that it is duly authorized and licensed to transact business in the State of Oklahoma and is a citizen of the State of Connecticut. The Court further finds that the Defendants, Leona Holcomb individually and

Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, Leona Denham Holcomb and Mary Jane Hopkins, Edward Denham were at the time of filing the action, citizens and residents of the State of Oklahoma.

The Court Finds Further that Edward Denham had died since the institution of this action and his heirs are his widow May Cecilia Denham and his daughters, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, and that May Cecilia Denham is the duly appointed and acting guardian of Dorothy Lee Denham, a minor, and that this action has heretofore been revived in the name of the heirs of Edward Denham.

The Court Further Finds F. E. Pence is a citizen of the State of Oklahoma and was such a citizen at the time of the filing of the action.

The Court Finds Further That under the appropriate acts of Congress pertaining to declaratory judgments and interpleader that the requisite diversity of citizenship exists between the plaintiff and Defendants and the intervenor, and that this Court has jurisdiction of the parties and the subject matter of the action and that a justiciable controversy exists between the Plaintiff and the Defendants involving the rights and liabilities under the contracts of insurance set forth in the pleadings.

The Court Finds That on the 27th of October, 1950, on application of one Donald George Fleming, the defendant herein, a minor of eleven years of age, the plain-

tiff Aetna Life Insurance Company made, executed and delivered its certain annuity insurance contract No. N1669203, being the insurance annuity contract heretofore referred to in plaintiff's Complaint for Declaratory Judgment and for interpleader under Rule 22 and in the amendment to the complaint for interpleader upon payment to it of funds of the said Rosa B. Wright Rettenmeyer in the sum of $25,143.03. That the Defendants Mary Jane Hopkins nee Wright, Leona Holcomb,& Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham in Cause No. 87402 in their Amended Petition filed in the District Court of Tulsa County, State of Oklahoma, claimed that certain United States Bonds belonging to Rosa B. Wright Rettenmeyer as described in their Petiton of a total face value of $185,000 and having a market value of $191,864.64 were converted by the Defendant, Aetna Life Insurance Company and the intervenor, F. E. Pence, who is one and the same F. E. Pence as is set forth in the application signed by Donald George Fleming attached to annuity insurance Contract No. N1669203.

The Court Further Finds from the pleadings that $25,143.03 of the proceeds of said bonds were used to pay the premium on policy No. N1669203.

The Court Further Finds That on the 9th day of December, 1950, on application of the said Rosa B. Wright Rettenmeyer the Plaintiff made, executed and delivered its certain single premium annuity contract No. AN33409,

which contract appears as an exhibit to Plaintiff's Complaint in Cause No. 3502 filed in this Court, being the annuity contract heretofore referred to in Plaintiff's Complaint in Cause No. 3592, upon payment to it of the funds of the said Rosa B. Wright Rettenmeyer in the sum of $162,606.00.

The Court Further Finds That the Defendants Frank T. Denham, Clarence N. Denham, George N. Denham, Leona Denham Holcomb, Leona Denham Holcomb as guardian of Donald George Fleming, a minor, Mary Jane Hopkins and the Defendants, heirs of Edward Denham, to-wit: May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, in their pleadings and in open court by their counsel, assert that they make no claim as to the unvalidity of the insurance contract No. N669203 hereinabove referred to, and assert further they make no claim as to the invalidity of annuity Contract No. AN33409 hereinbefore referred to, but state that said insurance and annuity contracts are now incontestable and are valid contracts and are due and payable according to the terms of said contracts and further that said Defendants, through their counsel, state that there was no controversy between anybody as to the issuance of the policy and that there is no conflict among the parties as to who receives the payments due under said contracts of insurance, and that the identity of the beneficiaries under the policies is established and that no one is contending that the policies are invalid and that they

the said defendants, are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Rettenmeyer.

The Court Further Finds That the said Defendants, on request of the Court declined to assert any claim for conversion of the bonds in this cause, and stated in open court that the defendants' pleadings measured their claims in the Unted States Court accurately and carefully, and thereupon the Court, having considered all the pleadings heretofore filed and the statements of counsel, finds that there remains no issue of fact to be tried in the present cause and that judgment should be rendered for the Plaintiff as hereinafter set forth.

The Court Further Finds That the Beneficiary and life owner presently of the policy, towit: Donald George Fleming, makes no claim that the insurance policy or annuity Contract No. N1669203 is invalid.

The Court Further Finds That none of the Defendants assert or make any claim or tender any issue in this Court for the conversion of the bonds as alleged in the Petition attached as an exhibit in Cause No. 87042 in the District Court of Tulsa County, which cause of action is still pending in the District Court of Tulsa County.

The Court further Finds That at the time of filing the Complaint in interpleader and the amendment thereto, and Complaint for Declaratory Judgment, the Defendants herein in Cause No. 87042 asserted claims for conversion of the bonds and that in an action in this Court Donald

George Fleming now claims that the policy is valid and also claims a cause of action in Cause No. 87042 in the District Court of Tulsa County, sounding in conversion for converting the bonds, the proceeds of which went to purchase said Policy No. N1669203 and that such claims were conflicting and adverse and that this Court finds that the plaintiff is entitled to the declaratory relief demanded in the Complaint.

The Court Further Finds That Rosa B. Wright Rettenmeyer died on December 13, 1952, and that Joseph A. Rettenmeyer died on March 22, 1954.

It Is Therefore Ordered, Adjudged and Declared that the contract of insurance No. N1669203 wherein Donald George Fleming is the insured, is declared to be a valid contract and in full force and effect and the Plaintiff is ordered and directed to pay to the said Donald George Fleming the payments set forth in the policy in accordance with the terms thereof when due.

It Is Further Ordered, Adjudged and Decreed that Leona Holcomb individually and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, and Mary Jane Hopkins and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, heirs of Edward Denham, be and they are hereby perpetually enjoined and restrained from making any further

claims against the Plaintiff and against the intervenor F. E. Pence, on account of the alleged conversion of the bonds or conversion of the funds that went to purchase the insurance Contract No. N166203 herebefore referred to, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87042 in the District Court of Tulsa County.

Royce H. Savage,
District Judge.

Filed Jan. 14, 1957.

Donald George Fleming

Single

Single

Single

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Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U. S. C. A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract 57

In an action instituted in the federal court under 28 U. S. C. A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested, as devisee under a will? 58

Proposition IV of Petitioner 65

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335 where the record affirmatively discloses that by their terms the insurance contracts in question are incontest-

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able, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them concerning any of the terms or conditions of the policies or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res adjudicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto? 65

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1958

No. 365

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faharty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecelia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, *nee* Wright, and Mary Ellen Cash, *Respondents.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI.*

Introduction.

There are two cases involved, the first, No. 5620 in the court below is one in the nature of interpleader, brought by Aetna Life Insurance Company. Aetna had issued a large annuity contract to Rosa B. Wright-Rettenmeyer. At her death certain of her heirs some of whom were contingent beneficiaries under the annuity instituted conversion actions in the state courts claiming the funds that went to pay the premium of the annuity one of the plaintiffs, not a beneficiary was Donald George Fleming,

a minor. Certain other heirs, who were beneficiaries under the annuities asserted claims to benefits under the annuities as contingent beneficiaries. Faced with claims for a refund of the premiums allegedly converted by the insurance company, and with claims asserting the validity of the annuity by two sets of conflicting heirs and beneficiaries plaintiff instituted the present action. The trial court issued a temporary restraining order enjoining the prosecution of actions against Aetna pending determination of the interpleader action and until the further order of the court. After motion to dismiss was overruled and appeal time elapsed the court entered an order construing the order heretofore made specifically naming certain causes of action pending in the state court against the Aetna. From this order construing the order heretofore made appeal was lodged in the Court of Appeals of the Tenth Circuit, and this court affirmed the trial court. *Holcomb, et al.*, v. *Aetna Life Insurance Co.*, (Ct. of Appeals, 10th Cir., 1955) 228 F. 2d 75, certiorari was denied by the Supreme Court of the United States, 76 S. Ct. 473, 350 U. S. 986, 100 L. ed. 853; rehearing denied 350 U. S. 1016, 100 L. ed. 875, 76 S. Ct. 660.

At the same time the first case was filed on the large Rettenmeyer annuity contract there was filed the second action in the nature of interpleader, No. 5621 in the court below, under Rule 22, and for Declaratory judgment to determine the validity of a smaller annuity insurance policy upon the life of Donald George Fleming, a minor, procured by funds of Rosa B. Wright Rettenmeyer, annuitant of the large annuity.

After the appeal was remanded to the District Court the cases were consolidated for purposes of trial, and there was a pre-trial hearing.

The large annuity case No. 5620 culminated in an entry of a judgment at the pre-trial hearing following a statement of counsel for the Denham heirs, including Donald George Fleming, that the beneficiaries under the annuity and insurance contracts made no contention that the policies were invalid and that they were entitled to the moneys due under the policies. The court considered this as a ratification of both the large annuity and the Donald George Fleming insurance contract and on refusal of the Denham heirs to tender any issue or claim for conversion of the bonds in the interpleader actions in the United States District Court, entered a judgment for the plaintiff and perpetually enjoining defendants from proceeding further with their claims against the insurance company and other defendants in Case No. 87402, which was the State Court action in the District Court of Tulsa County, Oklahoma. In the smaller insurance contract Case No. 5621, petitioner, Donald George Fleming, a minor, was given a judgment upholding the insurance policy in his name by which he will receive $33,000.00 and upwards, and he appealed from the judgment.

The facts as disclosed by the pleadings and the pre-trial conference and the admissions will show that Donald George Fleming is a beneficiary under a single premium life insurance contract procured by his aunt, Rosa B. Wright Rettenmeyer, and paid for by her funds. Donald George Fleming in two separate lawsuits was a party to

actions to procure a return of funds that went to pay the premiums paid from the funds of Rosa B. Wright Rettenmeyer. In the U. S. District Court below and in the Court of Appeals he asserts that the contract of insurance is perfectly valid and, in view of the statements of counsel, at the pre-trial, that no one questioned the validity of the contract or the payment of the premiums paid before the death of Rosa B. Wright Rettenmeyer, the trial court had no alternative on the pre-trial, but to render a judgment in the nature of a declaratory judgment declaring the insurance contract in favor of Donald George Fleming, the petitioner, valid and restraining him and the remaining Denham heirs from proceeding in a suit to obtain a return of the premiums.

On appeal to the Court of Appeals for the 10th Circuit, the Court of Appeals affirmed the judgment of the trial court (see opinion, transcript in this Court and copied in petitioner's petition for certiorari, p. 19) *et seq.* and also reported in 255 F. 2d, 577.

Inasmuch as the facts are not sufficiently related in petitioner's petition we deem it necessary to set forth a chronological outline of the facts in both cases for a better understanding of the case.

Case Number 3502 is the U. S. District Court Interpleader Action on the large annuity;

Case Number 3503 is the U. S. District Court Interpleader and Declaratory Judgment action;

Case Number 5056 is in the U. S. Court of Appeals, being the appeal of the Denham heirs from the temporary restraining order;

Case Number 5620 is the appeal of the Denham heirs to the Court of Appeals from the pre-trial judgment on the large annuity;

Case Number 5621 is the appeal of the Denham heirs from the pre-trial judgment construing the small Donald George Fleming insurance annuity contract;

Case Number 87402 is the Tulsa County District Court case where the Denham heirs sued Aetna for conversion in the State Court;

Case Number 29092 is a case first filed in Creek County District Court of Oklahoma for conversion of a portion of the bonds that purchased the large annuity;

Case Number 29114 is a case filed in Creek County District Court for conversion of a portion of the bonds that purchased the smaller Donald George Fleming contract.

Outline of Facts Case 5620, being the large annuity case.

The record discloses:

Rosa B. Wright was the widow of a wealthy Oklahoman named Cal Wright and inherited a considerable estate from him. He died in March of 1928.

Rosa B. Wright married Joseph A. Rettenmeyer in 1937 (R. 5056, p. 13). Prior to her marriage an antenuptial contract was entered into in March of 1937 (R. 5056, p. 18). The gist of this agreement was to the effect that neither should have any claim on the property of the other.

In July of 1946, Rosa B. Wright Rettenmeyer executed a will (R. 556, p. 39). It provided the remainder and residue of the testatrix's property, went share and share alike to the following: Leona Denham Holcomb, a niece; Mary Jane Wright Hopkins, niece and adopted daughter; Frank T. Denham, a nephew; Edward Denham, a nephew; Clarence Denham, a nephew; George N. Denham, a nephew; Raymond Rettenmeyer, Forrest Rettenmeyer and F. X. Rettenmeyer, sons of Joseph A. Rettenmeyer and nephews of Rosa by her previous marriage, and Joseph A. Rettenmeyer, her husband, and Donald George Fleming, son of Leona Denham Holcomb. She nominated the First National Bank & Trust Company of Oklahoma City to be executor of the will.

In February of 1949 she suffered a stroke (R. 5056, p. 16).

On March 30, 1949, she executed a Power of Attorney to her husband, Joseph A. Rettenmeyer (R. 5056, p. 40).

The Second Power of Attorney was executed April 18, 1949 (R. 5056, p. 42).

On November 17, 1950, Rosa B. Wright Rettenmeyer signed an application for the puchase of an annuity contract No. AN33409 from Aetna Life Insurance Company, which is the subject of the interpleader action. It was issued on the 9th day of December, 1950 (R. 5056, p. 5, *et seq.*). It was a single premium contract and in consideraton of payment of the premium of $162,606.00, the Aetna agreed to pay $1,000.00 a month to Rosa B. Wright Rettenmeyer during her lifetime. After the death of Rosa B.

Wright Rettenmeyer each annuity payment of $1,000.00 a month should become payable to Joseph A. Rettenmeyer, husband of the annuitant if then living. After the death of the survivor, Joseph A. Rettenmeyer, the $1,000.00 a month should be apportioned when due as follows:

$123.07	Ellen Cash, niece of the annuitant
$123.07	Rufus Denham, nephew
$123.07	Marion Denham, nephew
$123.08	Lewis Denham
$123.07	Marion Rettenmeyer (widow of Forest Rettenmeyer)
$123.08	Frank X. Rettenmeyer, nephew of the annuitant
$123.08	Raymond D. Rettenmeyer, nephew of the annuitant
$ 23.08	Frank T. Denham
$ 23.08	Edward Denham
$ 23.08	Clarence M. Denham
$ 23.08	George N. Denham
$ 23.08	Leona Denham Holcomb
$ 23.08	Mary Jane Hopkins

On November 22, 1950, she executed the first codicil to her will (R. 5056, p. 43). In this codicil she referred to the gifts to the heirs mentioned in her will, and mentioned that Forest Rettenmeyer had died, leaving Marion Rettenmeyer, his widow, and she wrote that she desired that Marion Rettenmeyer take the part of her estate which would have been taken by the nephew. A certain note of Harve Bateman and Rosa B. Bateman for $10,000.00 was cancelled and the rest of the will was confirmed.

On January 30, 1951, she executed a second codicil (R. 5056, p. 45), which confirmed the will as modified by the first codicil and added a remark that if anyone contested the will his or her share becomes a part of the residuary estate and goes to the other heirs.

Rosa received $1,000.00 a month beginning in January, 1951, which payments continued on down to her death and then they were paid to Joseph A. Rettenmeyer, which payments continued on down to the date of his death. She died December 13, 1952, he died March 22, 1954 (R. 5056, p. 45).

Rosa B. Wright Rettenmeyer was adjudged incompetent by the County Court of Creek County on August 26, 1952, in Cause No. 6366 (R. 5056, p. 48). The Petition for Appointment of a Guardian was filed by Joseph A. Rettenmeyer through Embry, Johnson, Crowe, Tolbert & Boxley, his attorneys (R. 5056, p. 47). The County Court appointed her husband, Joseph A. Rettenmeyer, guardian of her person and appointed Guy L. Berry, a Sapulpa banker, guardian of her estate. At the time of the death of Joseph A. Rettenmeyer $39,000.00 had been returned under the annuity contract, either to Rosa or to Joseph under her power of attorney or to the guardian of Rosa or to Joseph after her death.

Letters testamentary were issued in the County Court of Creek County in Case No. 6442 after her will and both of the foregoing codicils had been admitted to probate on January 12, 1953 (R. 5056, p. 39).

The First National Bank and Trust Company of Oklahoma City was appointed executor of her estate. The claims and attacks on the annuity contract and the smaller annuity policy issued on the life of Donald George Fleming appear first to have been brought out in Case No. 6442, her will probate case. These attacks appear in the amendments to the Complaint in Intervention (R. 5056, p. 69) and were asserted in a Complaint in Intervention filed by Leona Holcomb and the other above named defendants, Hopkins and Denhams. It was alleged that while Rosa was incompetent and mentally incapacitated, that Joseph A. Rettenmeyer procured from her funds an annuity contract from Aetna Life Insurance Company ostensibly to Donald George Fleming in the face amount of $33,000.00. It was further alleged that within a month after procuring this first annuity contract with her funds; Joseph A. Rettenmeyer secured another annuity contract from Aetna Life Insurance Co. in the face amount of $162,000.00.

In the Complaint in Intervention in the County Court case in the prayer for relief it was sought by the Denham heirs to have the executor, First National Bank and Trust Company ordered to institute a suit to recover all omitted property belonging to the estate, including monies expended for annuity contracts.

Thereafter in the same probate case, Leona Holcomb and certain of the other defendants again attacked the validity of the annuity contract and the Donald George Fleming policy in an Amended Complaint in Intervention (R. 5056, p. 71).

This proceeding was heard by the County Court of Creek County on October 22, 1953. Judgment was rendered in that court as appears from the Journal Entry of the Judgment of the County Court (R. 5056, p. 22).

The present status of the appeal from the County Court is immaterial to this appeal and need not be discussed.

While the appeal was pending in the County Court case there was filed in the District Court of Creek County Case No. 29092 (R. 5056, p. 13). This was filed September 30, 1953. The plaintiffs were Leona Holcomb, Leona Holcomb, as guardian of Donald George Fleming, a minor, Ed Denham, Frank Denham, Clarence Denham, George Denham and Mary Jane Wright Hopkins. The suit was brought against Aetna Life Insurance Company, F. E. Pence (Aetna's agent), Joseph A. Rettenmeyer and the First National Bank and Trust Company, executor of the estate of Rosa B. Wright Rettenmeyer. An analysis of this suit shows that it is a damage suit against Aetna, Pence, and Joe Rettenmeyer for wrongfully taking $162,606.00 from Rosa B. Wright Rettenmeyer when she was 80 years old and incompetent. It was a companion suit to a suit filed at the same time, No. 29114 in the District Court of Creek County on the Donald George Fleming contract.

Continuing with 29092, an analysis of the petition sets forth the family relationship, the fact that Joe married the wealthy widow, it set out the ante-nuptial contract and then said that Joe set out to circumvent the will and ante-nuptial contract and take for himself and his kin the lion's share of the estate to the exclusion of the plaintiffs. It

pleaded the execution of the will and then pleaded that the consent of the First National Bank and Trust Company as executor to recover the bonds and money wrongfully taken could not be obtained, so the bank as executor is joined as defendant. It was alleged that Joseph A. Rettenmeyer got Rosa to execute a power of attorney, and then she had a stroke, that she was totally incompetent, and then sets out that the defendants entered into a scheme to take the $162,606.00 and to accomplish this that Aetna, Pence, and Joseph A. Rettenmeyer persuaded her to liquidate U. S. Government bonds and place the proceeds in her bank account at Oklahoma City and thereafter they took and carried away the money, and as a cloak to legalize the plan and conceal it they placed the Annuity Contract No. AN33409 in and among her effects. The petition alleges that Joseph started getting the $1,000.00 a month, deposited it to Rosa's account and that he himself lived on it until her death in 1952, and that such part as was used for the benefit of Rosa was used without her knowedge or consent and for the purpose of concealing the plan and device from which her estate was taken from her. It prayed judgment for the $162,606.00 with interest against Aetna, Pence and Joseph A. Rettenmeyer.

In the Case No. 29114 it was sought by plaintiffs to recover the monies that went to purchase the $33,000 Donald George Fleming policy, $25,143.03, and allegations are similar to those in Case No. 29092.

An amended petition was filed in Case No. 29092 on April 7, 1954, and refiled April 15, 1954 (R. 5056, p. 31). Certain parties were added to this case. The plaintiffs were

the same and the suit was against Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, Oklahoma. Then there were certain bankers in Oklahoma City, employees of the First National Bank, namely Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty, added as defendants.

The Amended Petition differs from the former Petition in that it sets forth that Rosa owned certain United States Government bonds with a market value of $191,-864.64. The petition then alleges that the bonds would have been divided according to her will, that is, 1/11th to Joseph A. Rettenmeyer and 7/11ths to the plaintiffs. 3/11ths to the children of Joseph A. Rettenmeyer, and that it was the duty of the defendants to preserve her property for disposition conformable to the terms of her ante-nuptial contract, will and codicils, but then alleges that there was a breach of trust in that the defendants on October 31, 1950, secretly entered her lockbox in the First National Bank & Trust Company and without authority of law, took, stole, and carried away the bonds and endorsed an "X" or caused an "X" to be endorsed, purporting to be the act of Rosa B. Wright Rettenmeyer and procured the cash value of $191,864.64 and converted it to their own use. It will be observed that at this time the plaintiffs have added 29114, being the suit on the Donald George Fleming policy, to Case No. 29092, and have now made Case No. 29092 a suit for conversion for the full amount of the bonds that went to purchase the two insurance contracts, and omitted any reference to annuities.

The petition then alleges that she died December 13, 1952, that the bank was appointed executor, and that it refused to sue for the recovery of the assets of the estate and increment or profit or any part thereof. And further that the plaintiffs were unable to discover the facts until less than one year prior to the date of filing the action. That the plaintiffs (although they had no present property right in the bonds) suffered damage in the sum of $191,864.64 with interest at $39,487.00, or a total of $231,351.94 plus punitive damages in the sum of $231,351.94.

Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same lawsuit was filed (R. 5056 p. 72) as the Amended Petition in No. 29092, in the District Court of Creek County.

On April 16, 1954, the present actions resulting in this appeal were filed in the United States District Court for the Northern District of Oklahoma. The first was Case No. 3502 (R. 5056 p. 3) and was a Complaint for Interpleader and was brought by Aetna Life Insurance Company against all the beneficiaries in the Policy No. AN-33409, the large annuity and also against all adverse claimants.

The complaint alleges diversity of citizenship, and that the amount in controversy exceeds the sum of $3,000.00.

The complaint alleges, after setting forth the admission of the will to probate with the codicils, that the Oklahoma Denhams, Mrs. Hopkins, Donald George Fleming and Leona Holcomb, filed Case No. 29092 against Aetna

attacking the validity of the annuity contract and seeking to recover the premium paid of $162,606.00 for the estate of Rosa B. Wright Rettenmeyer. The complaint then sets out the order of the County Court of October 22, 1953, holding that Rosa was competent and instructing that no suit against Aetna be filed. It alleges then that Joseph A. Rettenmeyer died on the 22nd of March, 1954. It alleges that the beneficiaries named in the annuity contract who were not parties to Case No. 29092, namely the Rettenmeyers, Lewis Denham, Marion Denham, Rufus Denham and Ellen Cash are claiming to be entitled to monthly payments provided in the annuity contract.

Thereafter the amended petition filed in Case No. 29092 is referred to. It is then alleged that the Denhams, Leona Holcomb and Mary Jane Hopkins by reason of their petition are seeking to have the single premium payment of $162,606.00 paid back by Aetna to the estate of Rosa B. Wright Rettenmeyer and that by reason of these conflicting claims the plaintiff alleges that a conflict has arisen as to which of the defendants are entitled to payments of their respective claims and the plaintiff has been subject and may be subjected to vexations and multitudinous lawsuits and further subjected to multiple payments in the event all of the defendants should prevail.

Then plaintiff sets forth that it has filed a bond with good and sufficient surety, the record shows the bond was approved by the court; then it prays that each defendant be restrained from instituting any action against the plaintiff or from prosecuting any pending action or actions against the plaintiff for recovery of the policy's proceeds.

or any part thereof, until the further order of the court and that the defendants be required to interplead and settle between themselves their rights.

Order for issuance of process and an injunction against interpleader claimants was issued and subsequently modified in part from which appeal was taken resulting in the decision of this Court affirming the trial court and reported in *Holcomb, et al.*, v. *Aetna Life Insurance Company* 228 F. 2d 75, certiorari denied.

On June 23rd prior to the final order appealed from, the plaintiff filed an amendment to its Complaint for Interpleader (R. 5056 p. 69) in which the plaintiff alleged that the Annuity Contract was purchased by Rosa B. Wright Rettenmeyer with the proceeds of the U. S. Government Bonds mentioned in the Amended Petition filed by Leona Holcomb in Case No. 29092 and that Rosa B. Wright Rettenmeyer signed the application for insurance and was competent when she signed the application and that she specified the terms and provisions of the annuity contract and thereafter ratified the contract by accepting the annuity payments during her lifetime and prior to the date that she was adjudged incompetent. Thereafter payments were made to the guardian of her estate, and on her death payments were made to Joseph A. Rettenmeyer, the sum total of all payments to $39,000.00.

Then the complaint further alleged that the Denhams, Holcomb, Hopkins and Fleming parties have attacked the validity of the annuity contract, not only in the maner alleged in the Complaint in Interpleader, but also in Case No. 6442 in the County Court of Creek County in which is

pleaded the contention that the purchase of the Donald George Fleming Annuity and the purchase of the large annuity were procured while she was incapacitated and that it was sought in the County Court proceedings to require the executor to institute suits to recover the money that went to purchase the two annuity contracts.

It is then shown in the amendment to the complaint (R. 5056 p. 71) that an amended complaint in the County Court was filed wherein the same attack was made on the validity of the annuity contract and the validity of the Donald George Fleming annuity. It was then alleged that Leona Holcomb and the Denhams and others in the same situation again attacked the validity of the annuity contract in Case No. 87402 in the District Court of Tulsa County, styled *Mary Jane Hopkins, et al* v. *Aetna Life Insurance Co.* To this amended complaint the Holcomb, Denham, Hopkins and Fleming interests filed amendments to their various motions and a supplemental motion to dismiss (R. 5056 p. 72).

Prior to that appeal motions were filed by the First National Bank & Trust Company for leave to intervene as well as motions to the same effect by Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty and F. E. Pence (Supp. Tr. 5056 pp. 1 to 5).

Prior to the appeal Francis X. Rettenmeyer was given permission to intervene as executor of the Estate of Joseph A. Rettenmeyer, deceased, on the 19th of November, 1954. The remaining motions were taken under advisement, briefs submitted and after argument the court

permitted the First National Bank & Trust Company, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty and F. E. Pence to intervene. Amended complaints by these Intervenors were filed (R. 5620 pp. 11, 17, 18, 23 & 29). And on application of the parties duly filed for injunction by these intervenors (R. 5620 pp. 28 and 29) the court entered its decree of preliminary injunction (R. 5620 p. 30) in which the court enjoined Leona Holcomb and others similarly situated from proceeding further against Pence, the bank and the bankers in Cause No. 29092 in Creek County Court, and 87402 in the District Court of Tulsa County conditioned upon a bond being filed. The bond was duly filed and the temporary injunction and restraining order issued.

No appeal was taken from this order. Thereafter, answer was filed by defendants, Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Frank T. Denham, George H. Denham, Clarence Denham and Mary Jane Hopkins, to the amended Complaints of the intervenors. (R. 5620 p. 37). This answer contains no specific denial of the allegations in the amended complaints in intervention. The complaints in intervention (R. 5620 p. 10) alleged diversity of citizenship between the intervenors and Aetna and diversity of citizenship between the intervenors and all other non-residents of the State of Oklahoma. Complaints recited that Rosa had a large number of bonds in her lock box in the bank and prior to her death she contracted with Aetna through Pence for certain life insurance annuities, referring to the large annuity. The complaints alleged that

Rosa B. Wright Rettenmeyer gave to Joseph A. Rettenmeyer certain powers of attorney and pursuant to the powers of attorney Joseph Rettenmeyer procured certain government bonds endorsed by Rosa B. Wright Rettenmeyer and delivered them to Pence, and Pence in turn delivered the bonds to the First National Bank to be converted into cash. The bonds were converted into cash and the proceeds deposited in the First National Bank & Trust Company of Oklahoma City to the account of Rosa B. Wright Rettenmeyer. Thereafter, Joseph A. Rettenmeyer, under the power of attorney granted him by Rosa B. Wright Rettenmeyer drew a check, or checks, from the account of Rosa B. Wright Rettenmeyer in payment of the premium, or premiums on the Aetna Life Insurance Company annuity contract and insurance policy on the life of Donald George Fleming. Thereafter the two insurance contracts were issued.

These allegations are nowhere specifically denied in the Answers that are later filed by the defendants in the case. Answer of Leona Holcomb (R. 5620 p. 37) and others to amended complaints of intervenors, and separate Answer of Mary Ellen Cash to Amended Complaint of plaintiff and intervenors.

The Amended Complaints in Intervention set forth the status of the suits against the intervenors in the County Court of Creek County and the District Court of Tulsa County, No. 29092 and No. 87402, and seek, in the event the court should find the annuity contracts not valid that the intervenors have their rights adjudicated over and against the plaintiff, Aetna Life Insurance Company, as the ultimate recipient of such alleged converted funds.

The answer of Leona Hocomb and others (R. 5620 p. 38) has the following important paragraph:

"Defendants aver that plaintiff's liability under policy AN-33409, issued by Aetna Life Insurance Company of Hartford, Connecticut, under date of Dec. 9, 1950, is an incontestable obligation due and payable under the terms and conditions set forth and specified in said policy; * * *"

As will be later pointed out this amounts to a ratification of the policy and an election by the Leona Holcomb and the Denham heirs to take the benefits under the policy. The separate answer of Mary Ellen Cash (R. 5620 p. 40) contains the following paragraph:

"For further answer this defendant alleges that on or about Dec. 9, 1950, Aetna Life Insurance Company made, executed and delivered its policy AN-33409 under and whereby it became and has at all times since been obligated to make payments to this defendant as therein specified and set forth; this defendant admits that Exhibit 1 to plaintiff's Complaint is a true and correct copy of said policy and this defendant avers and states further that said policy contains the following express provisions, which are binding upon plaintiff, that is to say:

'This contract and the application herefor constitute the entire contract between the parties hereto and it shall be incontestable after it has been in force during the lifetime of the annuitant for a period of two years from its date of issue; * * *'."

This amounts to a ratification on the part of Ellen Cash and a reassertion of the claim by Ellen Cash.

Edward Denham died and an order was entered on October 25, 1956, substituting his heirs (R. 5620 p. 43). The defendant Leona Holcomb and the Denham heirs and Mary Jane Hopkins, filed an amendment to Answers (R. 5620 p. 44) in which is pleaded that the interlocutory order of the County Court was vacated in the District Court of Creek County and then contains the following, which amounts to a ratification of the policy:

> "Defendants further respectfully show that the policy annexed to and being part of plaintiff's Complaint as Exhibit 1, contains the following binding provisions which constitute a part and parcel thereof:
>
> "Under and by virtue of said provisions these defendants aver and assert that the plaintiff is barred and estopped from attempting to evade the obligations of said contract and said application upon grounds alien, aside and apart therefrom upon an assumption that the entire contract between the parties is other and different from that set forth in the 'contract and the application;' and said plaintiff is further barred and estopped from attempting to contest its liability to the annuitant designated in said contract by the express provisions thereof."

OUTLINE OF FACTS CASE NO. 5621

The second interpleader action was on the Donald George Fleming contract.

Turning to Case No. 5621 the Donald G. Fleming Contract we find that on the 16th day of April, 1954, the same time the large annuity suit was filed, the plaintiff, Aetna Life Insurance Company filed in the United States District Court for the Northern District of Oklahoma, its Complaint for Declaratory Judgment and for Interpleader under Rule 22, (R. 5621, p. 160) Aetna alleged it was a

Connecticut Corporation and the Complaint was under Federal Declaratory Judgment Act, Title 28, U.S.C.A. Sec., 2201, and for Interpleader under Rule 22. It recited identity of the parties, namely that the defendants, Leona Holcomb individually and Leona Holcomb, as Guardian of the person and estate of Donald George Fleming, a minor, and Donald George Fleming, Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, were all citizens and residents of the State of Okahoma, and diversity of citizenship existed, and the amount of the controversy exceeded $3,000.00 exclusive of interest and costs.

Paragraph III of the Complaint alleged facts which are undenied in the Answers filed in the case. Paragraph III in substance alleges that on October 27, 1950, Rosa B. Wright Rettenmeyer procured for the benefit of Donald George Fleming, a minor, a life insurance contract which contract was between Rosa B. Wright Rettenmeyer and the plaintiff, Aetna Life Insurance Company, for which she paid a single premium in the sum of $25,143.03. By the terms of this contract, Donald George Fleming was to be paid the sum of $33,000.00, if living, at the end of fifteen (15) years from the date of the contract. Otherwise, as provided in the contract. A copy of the policy was attached to the complaint which is Plaintiff's Exhibit 1. (R. 5621, p. 164 *et seq.*) The Complaint then alleged that Rosa died December 13, 1952. Her will was probated. Thereafter in Case No. 29114 Creek County, Leona Holcomb, Leona Holcomb as Guardian and the other named defendants, filed suit attacking the validity of the life insurance contract

and seeking to recover the premium paid in the sum of $25,143.03 for the Estate of Rosa B. Wright Rettenmeyer, joining as defendants the Estate of Rosa B. Wright Rettenmeyer, the First National Bank & Trust Company of Oklahoma City and F. E. Pence. The Petition in No. 29114 was similar to the Petition in No. 29092, Creek County District Court, the suit on the $162,000.00 annuity contract which is the subject of Case No. 3502 U. S. District Court No. 5620 in the Court of Appeals.

The Complaint further alleged that one Joseph A. Rettenmeyer, uncle of Donald George Fleming and husband of Rosa B. Wright Rettenmeyer, was the life owner of the policy, but that Joseph A. Rettenmeyer died the 22nd day of March, 1954. The complaint alleged that an actual controversy of a justiciable nature exists between plaintiff and defendants who are citizens of different states, involving the rights and liabilities under the contract of insurance and depending upon the construction of the insurance contract. Paragraph VIII of the complaint alleged that the liabilities under the policy or its transactions of Rosa B. Wright Rettenmeyer can be fully determined upon the issues presented by its complaint for Declaratory Judgment avoiding a multiplicity of suits for the reason that should the guardian of Donald George Fleming and the defendants other than Donald George Fleming prevail in the action and recover the moneys paid for the premium by Rosa B. Wright Rettenmeyer, the plaintiff might be faced with a suit by Donald George Fleming to enforce the contract of insurance, and that the rights of all the parties cannot be adjudicated in the pending action in the District Court of Creek County, and that

Donald George Fleming has a claim for all of the funds under the contract and that by reason of defendant's claims, doubt has risen as to who is entitled to the premium or the contract proceeds. Complaint then prayed for Declaratory Judgment construing the provisions of the policy and determining the respective rights and liabilities of the plaintiff and all of the defendants and praying that each defendant be restrained from instituting any action or proceeding in any pending action for the recovery of the amount of the contract. The complaint prayed further that the defendants be required to interplead and settle between themselves their rights, if any, to any money due because of the contract The complaint was verified.

After Motions to Make More Definite and Certain and to Strike were overruled by the Court, (R. 5621 p. 180, 181) an Amendment to the complaint for Interpleader was filed (R. 5621 p. 183). The amendment to the Complaint was filed June 23, 1954. Paragraph I alleged the policy was procured with the proceeds of the allegedly converted bonds. Paragraph III alleged that Leona Holcomb and the other named defendants attacked the validity of the insurance contract not only in Cause No. 29114, but also in certain proceedings in Case No. 6442 in the County Court of Creek County. In the County Court proceedings the validity of the insurance contract for Donald George Fleming was attacked in a complaint for Intervention as set forth. (R. 5621, p. 183) and also in an amended Complaint for intervention in the County Court. (R. 5621; p. 185). Paragraph V of the amendment to the Complaint alleged that the

contract of insurance has been similarly attacked in Case No. 87402 in the District Court of Tulsa County as well as Case No. 29092, Paragraph VII then alleged as follows (R. 5621, p. 185):

> "Plaintiff alleges that the said Rosa B. Wright Rettenmeyer used a portion of the proceeds of said bonds alleged to have been stolen and carried away and converted in paragraph 13 of the amended petition in No. 29092 and in paragraph 13 of the petition of Case No. 87402, to-wit: the sum of $25,143.03."

Defendants filed a Motion to Dismiss (R. 5621, p. 188)

This Motion was filed August 27, 1954, Rettenmeyer had died March 22, 1954.

On September 17, 1954, the Court overruled the Motion to Dismiss and entered and Order Abating the Action and Order Retaining Jurisdiction (R. 5621, p. 191). This was at the same proceeding where the Court overruled motions to dismiss the action in the Rosa B. Wright annuity suit Case 3502 or 5620 in the Court of Appeal and granted temporary restraining order. There was no appeal for this order refusing to dismiss the Complaint. Thereafter, following the decision of the Court of Appeals in Case 5056 on the large annuity case, F. E. Pence filed his Complaint in Intervention, with permission of the Court. (R. 5621, p. 108). Pence's Complaint (R. 5621, p. 192) alleges that Pence was a citizen of Oklahoma and that diversity of citizenship exists between the Intervenor and Aetna Life Insurance Company. (Actually all parties except plaintiff are Oklahomans) In Paragraph 2 Pence alleged for his claim against Aetna Life Insurance Com-

pany that Rosa B. Wright Rettenmeyer owned certain Government Bonds and prior to her death Rosa B. Wright Rettenmeyer contracted with Aetna Life Insurance Company through Pence for the purchase of the Policy of Insurance No. NI-669203, paying a single premium in the sum of $25,143.03. That the defendants filed Case No. 29114 in the District Court of Creek County and in this suit the plaintiffs therein were seeking to recover the money paid for the insurance policy and by reason of the fact it was contended that Government Bonds in the sum of $25,143.03 were converted by Pence as Agent of Aetna, reduced to cash and the proceeds used to purchase the insurance policy, but should the Court hold the policy invalid, plaintiff being the ultimate holder, the intervenor has the right to trace the funds into the hands of plaintiff, Aetna, to make the funds available to return to the plaintiffs in Cause No. 29114. Intervenor, in his prayer for relief, prayed that the insurance contract be declared valid and binding, or, in the alternative, should the Court hold the policy invalid that the intervenor have his rights adjudicated over and against the plaintiff, Aetna. On the 25th day of July, 1956, the Court entered the following order (R. 5621, p. 195):

> "Now, on this 25th day of July, 1956, the above captioned cause came on for hearing on the Court's own motion. All parties appeared by their respective counsel, and the Court having considered the status of the case, and the Court being fully advised, and on oral application in open Court if the plaintiff to vacate the Abatement Order and exercise jurisdiction, finds that the Order Abating the action heretofore made on the 17th day of September, 1954, should be vacated, set aside and held for naught."

The Court allowed the defendants 20 days to answer and granted a motion for a Preliminary Injunction (R. 5621, p. 195) restraining and enjoining the defendant Leona Holcomb, individually, and as Guardian of Donald George Fleming, and the other Denham heirs from instituting any suit in any State Court restraining them from prosecuting any suit pending in any State Court, and further enjoining and restraining them from instituting or prosecuting in any United States Court any suit or proceeding on account of or pertaining to Insurance Policy No. NI-669203, reserving unto them the right to appear in the instant suit and assert their claims which they may have.

By the 21st day of August, 1956, we find that the plaintiffs had dismissed No. 29092 and 29114 for in an argument on a Motion to Vacate the Preliminary Injunction, Mr. Young stated to the Court (R. 5621, p. 106), "We have dismissed all of these lawsuits, except 87402 pending in the District Court of Tulsa County, Oklahoma."

We now come to an important part of the case where Donald George Fleming, a minor, filed his Answer (R. 5621, p. 198). Donald George Fleming makes no general denial and denies no facts set forth in the Complaint filed except as hereinafter stated.

Paragraph 1 of the answer, Donald George pleads lack of jurisdiction. In Paragraph 2 he said that the Complaint fails to set forth any cause of action or ground for relief. Paragraph 3 alleges:

> "3. For further answer this defendant alleges that under date of Oct. 27, 1950, and when this defendant was a minor, 11 years of age, upon his application

duly made and executed, a copy of which application is appended to and made part of plaintiff's Complaint Aetna Life Insurance Company, the plaintiff, issued its policy No. N1-669203, and that Exhibit 1, appended to plaintiff's Complaint, is a true and correct copy of said policy."

Examination of this policy shows Donald George Fleming did sign the policy application, also Rosa B. Wright Rettenmeyer's name was signed by Joseph A. Rettenmeyer, attorney in fact (R. 5621, p. 177). Her name appears under the following:

"The premiums are to be paid from the funds of the undersigned."

The Answer then sets forth Paragraph 8 of the Policy which is the part saying the policy is incontestable after it has been in force for a period of two years, Then follows in the Answer an allegation which amounts to a ratification of the policy. This allegation is, as follows (R. 5621, p. 188):

"This defendant avers and alleges that under and by virtue of the foregoing express provisions of said policy, plaintiff is precluded from denying liability thereon; that said policy is now and has been at all times since the date of issuance thereof in full force and effect, incontestable by its terms, and the same constitutes a valid and binding obligation of plaintiff respecting the terms and conditions of which there neither is or has been any controversy between Aetna and this defendant of which this defendant has knowledge."

Paragraph 4 of the Answer alleges that none of the other defendants were parties to the contract and "that neither they nor any of them are entitled to benefits here-

under; nor have they, or either of them, so far as known to this defendant at any time asserted or claimed any rights or interests to any benefits under said policy, direct or indirectly."

Paragraph 7 of the Answer contained a general denial; however, the admissions in the Answer inconsistent with the general denial stand ahead of the general denial. The defendants, Leona Holcomb, individually, Frank Denham, George Denham, Clarence Denham and Mary Jane Hopkins filed separate Answers. (R. 5621, p. 197) In these Answers, each of these defendants adopt the separate answer of Donald George Fleming denying all material allegations of plaintiff's Complaint inconsistent thereto. They, therefore, adopt the admissions set forth in Donald George Fleming's Answer.

Donald George Fleming then filed a separate Answer to the Complaint of Intervener, F. E. Pence. (R. 5621, p. 202) Paragraph 1 sets forth absence of jurisdiction; Paragraph 2 sets forth that Pence and Donald George were residents of Oklahoma and there was no diversity of citizenship between Pence and this defendant. Paragraph 3 sets forth that the Complaint fails to state a claim; Paragraph 4 is, as follows:

> "4. Defendant avers that plaintiff's liability upon its policy No. N1-1669203 is an incontestable obligation, due and payable upon the face of the record under the terms and conditions of said policy to this defendant only."

The remaining defendants Leona Holcomb, as Guardian, and also the individual defendant, Leona Holcomb,

for their separate answers to Pence's Intervening Complaint, filed separate answers adopting the separate answer of Donald George Fleming to the Complaint of Intervener. (R. 5621, p. 200)

Thereafter, it developed that Edward Denham died July 31, 1956, and the action was revived pursuant to Order of Court entered October 25, 1956, as to Ed Denham. (R. 5621, p. 205) In the Order it was ordered that the action proceed on pleadings filed by Edward Denham the same as though filed for the other defendants.

The pleadings by the other defendants were adopted by the substituted defendants (R. 5621, p. 109).

We then came to the action of the court which took place at the pre-trial hearing on December 10, 1956 (R. 5620 p. 120 *et seq.*) Before that time the court vacated its order abating the interpleader and declaratory judgment action on the Donald George Fleming policy (R. 5620, p. 195), and the pre-trial took up both cases.

After counsel for Aetna made a statement regarding the proposed proof of the plaintiff and the history of the litigation which at this point will not be repeated, counsel for Donald George Fleming, the Denham heirs, Leona Holcomb, and Hopkins, made the following statements (R. 5620, p. 133):

> "Mr. Glenn O. Young: Now we think the issues here, if your Honor please, are determined very largely by the contract that Aetna issued, which we understand Aetna is here, on the theory that there are divergent and conflicting claims being made on the proceeds of the annuity issued by Aetna—rather,

two of them, the two cases are sort of companion cases and I am assuming will be more or less unavoidably interlocked, at least Mr. Woolsey has treated them so. We don't agree that they constitute a single cause of action; rather we say they are separate contracts, with different persons.

"Now our thought about the matter is this: Aetna's liability is not other or different than set forth in his contract, because the contract says expressly that the policy and the application constitute the entire contract between the parties; that is paragraph 7 of the contract before the Court, is the policy of Aetna, and appended to the policy is the application referred to in the policy. The policy contains a further proviso expressly assenting that after lapse of two years it shall be incontestable. Now we assert here that there isn't any controversy between anybody, that the issuance of the policy—we say it was issued by Aetna; we say it is uncontestable. We say there is no conflict among the parties who are designated as annuitants, as to who receives what. There is nothing under the policy that is in controversy at all. The beneficiaries under the policy the identity of them is established. None of them are contending that the policy is invalid—they are not contending that one is entitled to a little more or a little less; they are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Bettenmeyer—no such question is involved; no question raised concerning the payments that were made under the policy to either Joe, or to the guardian, or the circumstances under which they were made for the purpose of this litigation in this Court. * * * I say there is no controversy in this Court at this time pertaining to any payments made by Aetna, but if the question was raised Your Honor would be confronted

here with the express provision of the application which says that these payments under this policy are to be made to the annuitant."

Then a colloquy took place between the court and Mr. Young in which the court reviewed the litigation and the contentions of the parties (R. 5620 p. 134):

"The Court: Well, now, let me first make quite clear my conception of what the situation is in this case at this time. * * *" And then said:

"* * * While the case involves of course some very naughty (knotty) problems, which have been rather perplexing to me, nevertheless we have now arrived at the point where I have concluded, as fa as I am concerned, that all of these matters must litigated here. And it has been my intention in enter- ig the orders that have heretofore been entered to require the parties who are defendants here, who are among the beneficiaries of the annuity contract and who are likewise plaintiffs in the suit pending in the District Court of Tulsa County, to assert here in this Court, if they choose to do so, whatever claims they may have, not only against the Aetna, but against the other parties defendant in the pending case in the District Court of Tulsa County.

"Now, of course I cannot require the parties to assert the claim here. I can only require that the claim be asserted here, or otherwise suffer a ruling to be made by the Court which would in my judgment be *res adjudicata* with respect to the issues joined now in the District Court of Tulsa County.

"Now I note from the answers filed by your clients—on behalf of your clients, Mr. Young, that there is apparently no attempt to join issue here in this case on the alleged cause of action plead and asserted in the District Court of Tulsa County. It appears to me that the answer filed on behalf of your

clients is intended to reassert, reallege, and restate the position that you have taken all along, that this Court has no jurisdiction to pass upon the issues which are joined between the parties in the District Court of Tulsa County. So, I think it quite essential here at this pre-trial hearing that we come to a definite understanding as to what issues are joined between the parties in this case which are to be tried—actually tried when the case comes on for trial.

"Mr. Glenn O. Young: May I proceed?

"The Court: I invite your further attention to those matters.

"Mr. Glenn O. Young: I would like, in answer to Your Honor's observations, to assert first this: On behalf of our clients we don't want to subject them to a situation where they can lose a lawsuit but not win it. Our objection to litigating this case over in Tulsa County, in this Court, is that all we could possibly do would be lose. This court has got no jurisdiction under either the pleadings of Aetna, or otherwise, as we understand the law, to decide a tort claim against, for instance, Joe Rettenmeyer.

"The Court: Yes, sir.

"Mr. Glenn O. Young: His successors—

"The Court: I understand. I say, that has been your position all along. We are at the point now

"Mr. Glenn O. Young: If your Honor has—

"The Court: Where the only thing we need to come to an understanding about is whether you on behalf of your clients intend to assert here in this Court the tort claim, as you refer to it, which has been pled in the District Court of Tulsa County.

"Mr. Glenn O. Young: I am attempting, if your Honor please, to show why, in properly representing our clients, we could not, if we elected to do so, —

mit the tort claim to this Court, because this Court cannot in our considered opinion lawfully render a judgment in our favor, and we are serious about the claim that I say is asserted, and it is for that reason we ourselves in, a place where—naturally Aetna would like to litigate the lawsuit where they can win and not lose, and so would these other point tort feasors; they would like to have the claim asserted and determined over here where they have got no chance to lose. As we understand the essence of justice it would be that the Court would be permitted to do full and complete justice; if our claim is correct that Aetna Life Insurance Company and its co-defendants converted unlawfully, bonds, and owes us some hundreds of thousands, worth of damages under the law, we ought not to be required to litigate that claim in a position where we can lose it but can't win it.

"The Court: Well, I understand that has been your position all along. What I am calling your attention to now is that by virtue of orders heretofore entered in this Court, one of which is affirmed by the Court of Appeals, it is presently my view that you must litigate that question here, if at all.

"Mr. Glenn O. Young: Well—

"The Court: And it is further my view that if you don't tend the issue here and litigate it here that it will be necessary for this Court to enter a judgment which will attempt to foreclose you with respect to that issue.

"Mr. Glenn O. Young: Well—

"The Court: And bar, under the principles of *res adjudicata*, any subsequent litigation on that proposition. Now.—

"Mr. Glenn O. Young: May I—

"The Court: It is perfectly all right with us. The only thing I am trying to do is to be certain that we have no misunderstanding about it.

"Mr. Glenn O. Young: I think we have none except this:

"The Court: All right.

"Mr. Glenn O. Young: We think it rather unfortunate Your Honor would adjudicate the case before you hear us.

"The Court: Before I hear you?

"Mr. Glenn O. Young: Yes.

"The Court: I am perfectly willing to hear you if you tender the issue; I can't hear you if you don't tender the issue.

"Mr. Glenn O. Young: We are, if the Court please, tendering what we think are the only issues that could arise in this case.

"The Court: I understand, but—

"Mr. Glenn O. Young: And to say that the pleadings are the measure of the issues.

* * * * * * * *

"The Court: * * * —now this is my present view about it—I will raise this question for further view about it—I won't think that the burden is on Aetna to go into the question and affirmatively establish that the bonds were legally and lawfully cashed, the proceeds of which were used to pay the single premiums on these policies, unless one or more of the defendents raise that question and offer evidence intending to establish that proposition. In other words the burden is in my judgment upon any party defendant in this case to establish either the alleged illegality of the contract—annuity contract—and as I understand it nobody contends that it is illegal—and furthermore, the burden would be upon any party defendant to allege and prove any liability arising out of the conversion of bonds, the proceeds of which were used to pay the premium on the policy. It is my view

the burden is not on Aetna to go forward with the proof, with the alleged—with respect to the alleged conversion of these bonds. We get into that question only in the event you tender the issue in my judgment.

"Mr. Glenn O. Young: Aetna has not tendered that issue; neither have we.

"The Court: Well, I am trying to find out whether you intend to, or not. I want to know what we are going to try.

"Mr. Glenn O. Young: There is nobody more interested in that than we are, of course.

"The Court: Well, I am going to tell you—I am going to tell you when you get through, if you will answer my question and tell me whether you intend to tender that issue or not.

"Mr. Glenn O. Young: We think our pleadings measure our claims in this Court accurately and carefully, and we think Aetna's pleadings measure their rights.

"The Court: I take it from your statement then—

"Mr. Glenn O. Young: Aetna here—

"The Court: Listen to me a minute. I take it from your statement, or your failure to answer my question—

"Mr. Glenn O. Young: I have stated I feel in answer to your question—I have answered it.

"The Court: That these—since these pleadings don't charge Aetna with conversion of the bonds that you do not expect to offer proof intended to establish conversion of the bonds when this case comes on for trial.

"Mr. Glenn O. Young: In regard to that I will say this: That we will contest every claim Aetna makes. Now Aetna's pleadings are here before Your

Honor, and Aetna's pleadings don't contend that these bonds were or were not converted; they don't tender that issue. And I know of no reason why we should controvert an issue that they don't tender.

"The Court: All right, in view of that statement I will say now that if any evidence should be offered by the defendants designed to establish an alleged conversion of the bonds when the case comes on for trial that it will not be heard by the Court—it won't be received because of the position taken by counsel at this hearing as indicated by the record by the court—it won't be received because of the position taken by counsel at this hearing as indicated by the record already made.

"Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?

"The Court: Yes, I think I am.

"Mr. Glenn O. Young: And specifically denied it?

"The Court: I think I am aware of that.

"Mr. Glenn O. Young: I want Your Honor to understand now, if there is any doubt about it, so the record may be clear, that we contest every statement that Mr. Aetna—Mr. Woolsey has made in his opening statement to this Court—we contest them all.

"The Court: Do you take the position that the burden is on you under the state of these pleadings to affirmatively establish the circumstances under which these bonds were cashed and the proceeds used?

"Mr. Woolsey: Not now, Your Honor, in view of the fact of what Mr. Young has stated, that none of the heirs, or none of the Denhams, or none of the beneficiaries of the policies—either policy takes the position that the contracts are invalid; in other words

my position now is simply this: You can't eat your cake and have it too. That either the contracts are valid or they are invalid. If they are valid, Aetna can retain the premiums. You have gotten now from a statement of counsel a ratification by the Denham heirs of these contracts under the same—they now assert in this Court that they stand ready, willing and able to receive their part of the money. They don't claim it, but they say that they are willing to accept it and therefore they are in no better position than Rosa B.—

"The Court: I don't believe there is anything left to try; I think this case is now ripe for entry of judgment.

"Mr. Woolsey: I am inclined to agree with Your Honor. It is a proposition that they have ratified the contract by their statement, and I tender in open court payment of both the amount due under these contracts, and annuities, to the Denham heirs, together with accrued interest—I tender it in open court.

"The Court: All right, I am going to enter judgment accordingly in both cases on both contracts, of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay to Fleming in accordance with the terms thereof, and I believe the only—Donald George Fleming is the—.

"Mr. Woolsey: He is the beneficiary.

"The Court: Beneficiary under the contract.

. . . . . .

"The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined

from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicatation*.

* * * * * * * *

"The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time."

A Decree was entered in which the court held the annuity No. AN-33409 was valid and that the proceeds be paid to the named beneficiaries, and that the defendants appellants, be perpetually enjoined and restrained from making further claims against the plaintiff, and against the intervenors on account of the alleged conversion of the bonds mentioned in their petition in cause No. 87042 (R. 5620 p. 51); and from this Decree and Order Overruling the Motion for New Trial filed by the Denham heirs, Holcomb and Hopkins appeal was lodged in the Court of Appeals.

In the Donald George Fleming case, the Court entered its Order of Declaratory Judgment, which judgment stems from pre-trial hearing in the Court's final remarks (R. 5621, p. 142):

"The Court: All right, I am going to enter judgment accordingly in both cases on both contracts of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay Fleming in accordance with the terms thereof, or to the beneficiaries in accordance with the terms thereof, and I believe the only—Donald George Fleming is the—

"Mr. Woolsey: He is the beneficiary.

"The Court: Beneficiary under the contract. • • •

"The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicata.* • • •

"The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time."

The Court entered its Journal Entry of Declaratory Judgment (R. 5621, p. 206). The Decree after setting forth its formal parts, and the findings as to jurisdiction and diversity of citizenship and that justiciable controversy exists between plaintiff and defendants, is as follows:

'It is therefore Ordered, Adjudged and Decreed that the contract of insurance No. NI-669203 wherein Donald George Fleming is the insured, is declared to be a valid contract and in full force and effect and the Plaintiff is ordered and directed to pay to the said Donald George Fleming the payments set forth in the policy in accordance with the terms thereof when due.

"It is further Ordered, Adjudged, and Decreed that Leona Holcomb individually and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, and Mary Jane Hopkins and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Denham, a minor, and Carolyn Denham Lumley, heirs of Edward Denham, be and

they are hereby perpetually enjoined and restrained from making any further claim against the Plaintiff and against the intervenor F. E. Pence, on account of the alleged conversion of the bonds or conversion of the funds that went to purchase the insurance contract No. NI-669203 hereinbefore referred to, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87402 in the District Court of Tulsa County."

The two cases were then appealed to the Court of Appeals for the Tenth Circuit resulting in an affirmance by the Appellate Court (See Opinion p. 19 of Petition for Certiorari.) and 255 F. (2) 577—Donald George Fleming alone petitions this court for certiorari. None of the other defendants appeal to this court.

I.

The entry of judgment decreeing a permanent injunction at the pre-trial conference did not violate Article 3, Sec. 2, Cl. 1 of the U. S. Constitution and such judgment was authorized.

The entry of a judgment on pre-trial proceeding was authorized where no issues of fact remained to be tried.

The court, on the pre-trial, rendered judgment in favor of the plaintiff in determining, after the Denham heirs including Donald George Fleming, the petitioners here, refused to tender any claim and ratified the policy, that they should be permanently enjoined from proceeding to sue in any suit, particularly No. 87402. This was a correct ruling. Pre-trial conference is had under Rule 16, Federal Rules.

"Stipulations and statements of counsel at a pre-trial conference are binding with respect to facts admitted or agreed or defenses waived."

In Cyclopedia of Federal Procedure, Sec. 19.15 on Pre-trial proceedings it is said:

> "If the admission go far enough, or if the evidence is clear enough, no trial at all may be necessary. • • •"

Section 1933 of the same text says:

> "• • • But it is entirely possible that the state of the record at the stage of pre-trial hearing may be such as to make the entry of a final judgment disposing of the case not only proper but virtually mandatory."

The purpose of pre-trial procedure is to simplify the issues and avoid unnecessary proof of facts at the trial. *McDonald* v. *Bowles*, (9th Cir.), 152 F. 2d 741. Where pre-trial admissions and pleadings show no issues of fact remain the court has power to decide questions of law and enter summary judgment. 22 A. L. R. 2d 609.

We believe, at this point, that we should point out how the appellants removed any and all issues from the case by their statements in their pleadings, and by their statements at the pre-trial hearing so that there was no issue left for the court to determine. Therefore, the court was correct in rendering judgment on the pre-trial. We will endeavor to point out in the pleadings of the parties where some statement, or admission is made by appellants wherein the contracts are ratified by appellants or they elect to take the benefits under the contracts.

In the Motion to Strike of the defendants Leona Holcomb and others (R. 5056, p. 60):

> (6) "• • • Plaintiff's liability in tort is joint with parties it omits in attempted interpleader. Its obliga-

tion to make contractual monthly payments is plaintiff's alone, and in no wise related or connected to the tort complained of."

The defendant Ellen Cash, who was a contingent annuitant of the large annuity but not a legatee under the will stated in a Motion to Vacate Injunction filed on behalf of Ellen Cash (R. 5056, p. 63):

"* * * And upon the further ground that this defendant is entitled to bring her suit upon said contract AN-33409 prepared and made for her by plaintiff, Aetna Life Insurance Company, if each suit becomes necessary, in the State of Idaho where she is a resident and citizen under existing law or elsewhere that she chooses conformable to law, * * *"

Ellen Cash in her Answer, (R. 5056, p. 64), says:

"She is entitled unequivocally to the monthly payments provided in the annuity contract after the death of Rosa B. Wright Rettenmeyer and Joseph A. Rettenmeyer, and defendant states that said plaintiff should be making said payments to this defendant at this time monthly as therein provided."

In paragraph 9 of the same answer Ellen Cash says:

"With respect to Paragraph 3 of plaintiff's complaint, defendant, Ellen Cash admits plaintiff prepared and executed the contract referred to in said paragraph, and did take and receive the sum of $162,606 therefor and state by reason thereof plaintiff is obligated to pay this defendant $123.07 monthly commencing with the 9th day of April, 1954, and continuing thereafter conformable to said contract AN-33409."

In her prayer in her answer the defendant prayed that if jurisdiction be retained she have judgment against the Plaintiff, Aetna Life Insurance Company, in the amount of $123.07. This is the judgment that was rendered in her favor.

Defendants Leona Holcomb, individually and as guardian of Donald George Fleming, and the other defendants in the same situation as Leona in their Answer (R. 5620, p. 6), contend in Paragraph VII of the Answer that Aetna has no defense to the payment and discharge of its obligations conformable to the annuity contract and then in Paragraph VIII say:

> "These defendants further expressly deny that there is any dispute or controversy respecting the denominated beneficiaries of said contract or their rights inter sese to the proceeds thereof; or the obligation of Aetna to pay the amount therein specified to the persons therein designated and in the amounts therein set forth."

Similar recognition of the validity of the annuity contracts appear throughout the pleadings and we will refer to each.

Answer of the defendants Leona Hocomb, individually, *et al.*, to Amended Complaint of Intervenors First National Bank, *et al.*, (R. 5620, p. 37), Par. 4 on p. 38 there.

In the separate answer of Mary Ellen Cash to Amended Complaint of plaintiff and intervenors (R. 5620, p. 40), in Paragraphs 3 and 4 she asserts the validity of the Aetna Life Insurance Company Policy No. AN 33409 and states that it is incontestable and states that it is a binding and valid obligation.

Again, in the Amendment to Answers filed by Leona Holcomb and others, (R. 5620, p. 45, *et seq.*) Par. C states the policy is incontestable and by reason of the incontestable provision of the policy plaintiff is barred and estopped from evading the obligation of the contract.

We find in the briefs filed on behalf of these same defendants similar statements. See supplemental brief of defendants Leona Holcomb and others (R. 5056, p. 81):

> "• • • Recovery by captioned defendants for damages for converting bonds does not prohibit or prevent the other defendants from recovery on the contract."

Again, in a brief filed by defendants "Denham Heirs" in response to right of F. E. Pence to intervene, referring to the Ellen Cash Answer it is argued:

> "The only answers on file seek payment conformable to the terms of the annuity contract attached to Aetna's Complaint."

In a later proceeding on September 17, 1954, on a decision by the court on a Motion to Dismiss and other motions in an argument we find the statement by Mr. Glenn O. Young regarding the liability of Aetna on the policy. See R. 5620, p. 85:

> "The Court: Let me ask you a question: What is Aetna's responsibility with reference to payment to these beneficiaries under the annuity contract?
>
> "Mr. Glenn O. Young: Well, that is—it is responsible—its responsibility is to pay in accordance with its contract, but here is where we ought to start: What is the responsibility for conversion?"

On April 13, 1956, in a proceeding for a restraining order on the application of Francis X. Rettenmeyer, statements were made by Mr. Glenn O. Young which admit the validity of the contract (R. 5620, p. 99):

> "Mr. Young: Well I want to point out that we have some rights here that look to us like ought to be protected under this non-contestable policy of the Aetna. • • •"

"The Court: I intend to try to protect Aetna against double liability to your client or anybody else."

"Mr. Young: Well, I don't understand there is any particular obligation upon this court to protect Aetna against either single or double liability. Aetna owes our clients under the admitted facts in this court and they are not paying under a non-contestable policy; they come into this court and obtained a restraining order to prevent paying a liability which they admit—

"The Court: You frequently have a distorted conception of what represents justice between the parties, my judgment—

"Mr. Young: "Well, it is natural since I represent people suing Aetna that I would not feel inclined to go along with the court that the court ought to specially protect Aetna. Here our clients have been restrained here from receiving money that admittedly Aetna owes; they don't deny they owe it—I mean, not restrained from receiving it, but Aetna has refused to pay, although there is no question about their liability. Here is the situation—• • •"

Again in an argument on motions to vacate the injunction, August 21st, 1956, Mr. Young (R. 5620, p. 106), referred again to the incontestable clause of the policy as follows:

"• • • Aetna has been in this court for, I think possibly now more than two years; they have neither paid this policy—there is no contest whatsoever among the beneficiaries under the policy; none of them are contesting in any particular—they have all agreed that the policy was issued—."

Finally, on the pre-trial hearing we find the final ratification of policy by the Denham heirs, including Donald George Fleming, (R. 5620, p. 133).

We submit that in foregoing statements of their counsel in their pleadings, arguments, and in their briefs, we find a ratification by the appellants of the Rosa B. Wright Rettenmeyer Annuity Contract.

We feel that the actions of counsel and the actions of the clients through their pleadings, ratify the annuity contract. Having indicated in their pleadings, in their briefs, and in their statements at the pre-trial hearing, an intention to be bound by the contract by accepting the benefits, the Denham heirs cannot recover the benefits under the policy and then recover in the conversion suit in 87402, the only one left, the funds that went to create the policy. Obviously the Denham heirs can gain no better position than that of Rosa B. Wright Rettenmeyer, had she lived. Assuming for purposes of argument that Rosa B. Wright Rettenmeyer had been overreached and defrauded by Aetna and Pence and the bonds had actually been tortiously and wrongfully converted, if she accepted the benefits of the contract, however badly she was abused and overreached, she is bound by all of its obligations, one of which was to pay the premiums.

We find two Oklahoma statutes on this point: Okla. Stat. Ann. Title 15, Section 75; Okla. Stat. Ann. 1951:

> "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known, to the person accepting."

Title 15, Sec. 74, Okla. Stat. 1951:

"A contract which is voidable solely for want of due consent may be ratified by a subsequent consent."

The cases which apply to this statute are as follows:

Oklahoma Title Company v. *Burroughs*, 172 Okl. 94; 44 P. 2d 852;

Appleman v. *Pepis*, 246 Pac. 225; 117 Okl. 199.

Scherbondy v. *Tulsa Boiler & Machinery Co.*, 226 Pac. 564, 99 Okl. 214;

Ft. Deerborn Trust & Savings Bank v. *Skelly Oil Company*, 146 Okl. 179; 293 Pac. 557.

Such ratification or acceptance is binding upon heirs of a beneficiary. See *Canning, et al.*, v. *Bennett, et al.* (1952) 206 Okl. 675; 245 P. 2d 1149 Syl. 8:

"Beneficiary, who had recognized trust by conveying portion of her beneficial interest thereunder and who had accepted large distributions made by trustee from trust estate and acquiesced in trust for several years without in any manner objecting thereto, would not thereafter be heard to question its validity; and she, having died, her heirs would likewise be estopped to complain."

Such a ratification by a party or heirs is applicable in the case of conversion. This ratification relates back to the date of original execution.

Farm Mortgage Inv. Co. v. *Caskell*, 168 Okl. 312; 32 P. 2d 736:

It applies in the case of one defrauded. *Holcomb and Hope Mfg. Co. of Indianapolis, Inc.* v. *Jones*, 102 Okl. 175; 228 Pac. 968.

A party cannot rescind a contract for fraud after affirming it.

Skinner v. *Scott*, 29 Okl. 364; 118 Pac. 394.

The doctrine of ratification has been held applicable in cases of conversion. See *Farmers Nat'l Grain Corp.* v. *Kurkendall*, (1938); 83 Okl. 17; 79 P. 2d 570:

Syl. 2. "If the owner expressly or impliedly assents to the appropriation, taking, use, or disposition of his property, he cannot recover in an action for conversion."

Mason, et al., v. *Nibel*, (1938) 120 Okl. 7; 263 Pac. 121.

Syl. 3 "Where a party sues for a conversion of his property he must allege and prove that it was mistaken and appropriated without his consent and if such party expressly or impliedly assents to the taking, use, or disposition of his property, he cannot recover for conversion thereof."

We submit at this point when the Denham heirs seek to assert that they are now entitled to collect their part of the policy and stand ready, able and willing to receive the benefits and make no contention as to the invalidity of the insurance contracts and when their counsel states that they do not question the payments that were made to Rosa B. Wright Rettenmeyer, which in itself would be a ratification by Rosa B. Wright Rettenmeyer, why then we believe they bring themselves within the rule of ratification and the court had no other choice.

A still earlier Oklahoma case is that of *Dodd-Lee Lumber Company* v. *Gur* (1915) 44 Okl. 630; 146 Pac. 16. Syl. 3:

"It is a well settled rule that if the owner expressly or impliedly admits to or ratifys, the taking use, or disposition of his property, he cannot recover

for a conversion thereof and it is equally well settled that this is true, notwithstanding defendant exceeded the power given him."

The general principle involved is found in Corpus Juris Secundum, Vol. 89 C. J. S., p. 535 Sec 5:

"If the owner of expressly or impliedly assents to or ratifies the taking, use or disposition of his property he cannot recover as for a conversion."

See *Mason* v. *Nibel*, 263 Pac. 121; 129 Okl. 7.

Dodd-Leer Hardwood Lumber Co. v. *Gur.*, 146 Pac. 16; 44 Okl. 630.

Wright v. *School Dist. No. 97, Canadian County*, 128 Pac. 241; 36 Okl. 294.

Aylesbury Mercantile Co v. *Fitch*, 99 Pac. 1089, 22 Okl. 475.

All through the case counsel have overlooked this fundamental principle of law. The rights of the Denham heirs can rise no higher than the rights of Rosa B. Wright Rettenmeyer. Had Rosa B. Wright Rettenmeyer been stark raving insane or hoplessly incompetent, and had made the annuity contract in question and then had been restored to sanity and had ratified the contract by accepting the benefits, then this foregoing rule of law would definitely apply. So when all through the pleadings in the case and in the pre-trial the appellants, Denham heirs, and their counsel, stated that they recognized the validity of both contracts, then there was no choice on the part of the court but to render the judgment at the pre-trial conference.

The interpleader act was passed by Congress in 1948 and the Court had power under the interpleader act, and under Rule 22 of the Federal Rules of court procedure

and the declaratory judgment act to declare the Donald George Fleming Contract a valid contract and enjoin the proceedings in the State Court where Donald George Fleming through his guardian sought a return to his benefactress' estate of the premiums.

Aetna's first action is based on the interpleader statute Title 28, U. S. Code Anno. Sec 1335 Interpleader.

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount or $500 or more, * * *

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any such obligation; * * *

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, C. 646, 62 Stat. 931."

Injunctions in such actions were provided for in Title 28, U.S.C.A. Sec. 2361.

Section 2361. Process and procedure.

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United

States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * *

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, 117, 63 Stat. 105."

This court held under Interpleader Acts prior to 1948 claimants in State Court actions could be enjoined.

Dugas v. *American Surety Co. of N. Y.*, 300 U. S. 414, 57 S. Ct. 515, 81 L. ed. 720.

Cases to the same effect since the 1948 Interpleader Act are *O'Daniel* v. *Porter* C. A. P. C. 1957, 218 F. 2d 636 and *Austin* v *Texas-Ohio Gas Co.* (C. A. Tex. 1955) 210 F. 2d 739.

Although there was no evidence introduced, we believe there is ample grounds in the pleadings and admissions and counsel's statements that $162,606 of the proceeds of the bonds allegedly converted went to pay the premiums on policy No. AN-33409. An allegation regarding the $162,606 premium appears in the Amendment to Complaint for Interpleader. An allegation is made. (R. 5056 p. 69).

Par. 1. "That the annuity contract mentioned in its original complaint, No. AN-33409 attached to the complaint as exhibit 1, was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of U. S. Government bonds mentioned in Paragraph 13 of the Amended Petition filed by *Leona Holcomb, et al.*, in case No. 29092 in the District Court and mentioned in Paragraph 14 in the original Petition filed by *Leona Holcomb, et al.*, in case No. 29092."

The original complaint for interpleader, in Case 33[illegible] on the large annuity (R. 5056 p. 4), alleges:

> Par. III. "Plaintiff alleges that on the 9th day of December, 1950, plaintiff entered into a contract with Rosa B. Wright Rettenmeyer of Sapulpa, Oklahoma, which contract is one for which Rosa B. Wright Rettenmeyer paid a premium of $162,606,"

and attaches a copy of the contract as plaintiff's Exhibit "1." Attached to the Exhibit is the application signed by Rosa B. Wright Rettenmeyer.

Further it was alleged in Paragraph I of the Amendment to Complaint for interpleader (R. 5056 p. 69):

> "That the annuity contract mentioned in its original complaint, No. AN-33409 attached to the complaint as 'Exhibit 1,' was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in Paragraph 13 of the amended petition filed by *Leona Holcomb, et al.*, in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff *Leona Holcomb, et al.* in Case 29092."

A study of the answer of Leona Holcomb individually, and as guardian of Donald George Fleming, Frank T. Denham, Edward Denham, Clarence M. Denham, George H. Denham and Leona Denham Holcomb and Mary Jane Hopkins fails to deny the allegation as to the execution of this contract or the payment of the premium by Rosa B. Wright Rettenmeyer.

Under the rules of pleading under the Federal Rules of Procedure we find these facts therefore stand admitted. Rule 8:

"Rule 8 (d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading."

Further, in the answer of Ellen Cash, signed by Messrs. Young, Young & Young, the defendant, Ellen Cash, admits in Paragraph 9 of her Answer (R. 5056 p. 65):

"With respect to paragraph '3' of plaintiff's complaint, defendant, Ellen Cash admits plaintiff prepared and executed the contract referred to in said paragraph and did take and receive the sum of $162,606.00 therefor and states that by reason thereof plaintiff is obligated to pay this defendant $123.07 monthly commencing with the 9th day of April 1954 and continuing thereafter conformable to said contract AN-33409."

The finding that the $187,749.03 of the proceeds of the bonds were used to pay the premiums on both contracts is supported in a proceeding occurring on the 28th of November, 1956, prior to the pre-trial (R. 5620 p. 110) in which a motion for an order to compel answers to questions propounded on oral examination and to compel production and discovery of documents was being argued before the trial court. This record reveals by a statement of counsel for Aetna, that at the time of the motion there was pending a matter in the Estate of Rosa F. Wright Rettenmeyer in the County Court of Creek County and a large number of records were in possession of the First National Bank as executor These records were placed in the Court Clerk's office in Sapulpa and a portion of these records were introduced in evidence in the trial in the hearing on the final account in the Rosa B. Wright Rettenmeyer estate. Counsel then made this statement:

"Mr. Woolsey: In preparation of our case of terpleader, the interpleader action here, I deemed it important to look at some of those records, and take depositions of pertinent parts of those records, so I served a notice to take depositions on opposing counsel, and all parties interested, to take depositions on the 23rd of November, at which time I subpoenaed one Ed L. Murphy, and with Lee Snider, the Court Clerk of Creek County, to bring, and have with them, available, certain records. We started to take deposition and there were two books which had already been introduced in evidence and marked as exhibits in the District Court hearing, or the County Court hearing, which are cash books, and books of account of Rosa B. Wright Rettenmeyer, which I think were kept in the handwriting of her husband, or other members of her family, and these books bear entries pertaining to the cash transaction including the receipt to, Rosa B. Wright Rettenmeyer, and the disbursement of those annuities to certain parties for expenses in her last illness and various expenses of her household. And I deemed it important to have depositions taken, and be permitted—to have those books identified, and offered in evidence.

. . . . . .

"The Court: Just tell me what they are.

"Mr. Woolsey: They are cash books pertaining to the estate of Rosa B. Wright Rettenmeyer.

. . . . . .

"Mr. Woolsey: Mr. Murphy mentioned books kept in a double-entry system, a general ledger, a cash book, a voucher ledger, and notes receivable, and a material ledger, which he kept up to July 31, 1951. Well, these cover a period of time during which these annuities were purchased, and following that, so I deem it important to examine Mr. Murphy about the entries in those books and have those books made available.

The "Court: What do you expect to find in those books that might be material to any issue in this case?

"Mr. Woolsey: I expect to find more entries similar to what I have found in Aetna's Exhibits A and B; for example, they show receipt—

"The Court: Which tends to establish that the—

"Mr. Woolsey: Which—

"The Court:—that the amount used from the proceeds of the bonds to pay the—

"Mr. Woolsey: Pay the annuity contracts—

"The Court: For these annuity contracts.

"Mr. Woolsey: Yes, sir.

"The Court: And also tending to establish receipt by Mrs. Rettenmeyer during her lifetime—

"Mr. Woolsey: Either her, or her attorney-in-fact, or her estate, and her guardianship, and also tending to establish certain disbursements to individuals such as Leona Holcomb,—the defendants in these cases; in other words, these funds came in under this annuity, and then go out to pay nursing expense, some of which expenses were paid to Mrs. Denham, and various members of the family represented by the Youngs. They tend not only to show that but they tend to show the purchase of the annuities.

"The Court: Well, I don't anticipate that there could conceivably be any issue about the purchase of the annuities and the use of the funds.

* * * * * * * *

"Mr. Young, Sr.: I think we can stipulate to all counsel says; he is attempting to prove by these records. I don't think there is an issue about that. * * * There is no argument about receipt of that money. They have all the checks endorsed—I mean, the payments on the insurance—on the annuity; there is no argument about those matters—we are not contesting those matters—never have."

At various times as appears from the oral statement of counsel on argument on various matters, reference is made to the use of the ultimate proceeds of the bonds to purchase the annuities. Before the court was an argument on motion to dismiss. (R. 5620, p. 82):

> Mr. Glenn A. Young: Yes, sir, well, let it suffice to say that we have filed suit in the District Court of Creek County, Oklahoma. Originally the suit was filed for conversion by fraud for damages for the taking of the money that ultimately wound up in what they refer to generally heretofore in this litigation as the big policy. That is, this policy with the $162,000 single premium."

Again, on an argument on November 12, 1934, on motions of Pence, the bank and others to intervene, statement was made by Mr. Glenn O. Young (R. 5620, p. 90):

> "They take those bonds that are non-negotiable and then have Mr. Pence execute a form wholly whereby he purports to authorize exchange of those bonds for negotiable bonds, some that can be exchanged, and having exchanged the non-negotiable bonds—she had had them in that form to prevent exactly what happened, obviously—they then surrendered those negotiable bonds for cash, and deposited that to her credit in the bank."

In view of the foregoing the admissions in the pleadings, arguments, and stipulations show beyond question that the funds of Rosa B. Wright Rettenmeyer went to purchase the two insurance contracts.

(b)

The petitioner cites no cases where the pre-trial proceedings denied due process of law. It is not a deprivation of due process to decide a case where there are no issues to be tried. Neither is it lack of due process for a Court to enforce its decree by injunction otherwise the decree would be a nullity.

(c)

The court did not violate 28 U. S. C. A. 2238 prohibiting injunction to stay proceedings in a State Court. As that section specifically says "except where authorized by Act of Congress" we find permanent injunctions authorized in interpleader actions, Sec. 2361—

> "Such District Court shall hear and determine the case, and may discharge the plaintiff from further liability, *make the injunction permanent,* and make all appropriate orders to enforce its judgment."

Propositions II and III of Petitioner.

Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U. S. C. A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract?

In an action instituted in the federal court under 28 U. S. C. A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested as devisee under a will?

The answer to these propositions has partially been answered heretofore.

Appellants assert that since Donald George Fleming was not a party to contract No. AN-33409 and never asserted or claimed any rights under the contract. That the court has no jurisdiction. We believe that the Court of Appeals, in its opinion in the case of *Holcomb* v. *Aetna*, 228 F. 2d 75 disposed of this contention.

Donald George Fleming is the beneficiary under the small annuity contract that is the subject of litigation in Case No. 5621. Donald George Fleming asserts in Case 87402 in the District Court of Tulsa County that he has been damaged by fraudulent acts of the defendants Aetna, Pence and the bank and bankers, and that the converted funds should be restored to the Executor of his great aunt, Rosa B. Wright Rettenmeyer.

We believe, as will be pointed out in another section of this brief that the undisputed facts from the pleadings and admissions of counsel, show that the bonds of Rosa B. Wright Rettenmeyer were changed into other bonds and

then ultimately into cash, which was deposited in the bank account of Rosa B. Wright Rettenmeyer. On her signed application the annuity contract No. AN-33409; was issued on payment of $162,606 on a check signed by Joseph Rettenmeyer, attorney in fact for Rosa. The money went to set up the policy and $39,000 of this was refunded under the annuity contract. To say Donald George claims no interest under Contract No. AN-33409, when he is seeking in a separate suit to recover the premiums, or recover funds that went to pay the premiums, is a most fallacious argument.

The court had jurisdiction of the smaller action on the Donald George Fleming policy.

Under Rule 22 of the Federal Rules of Civil Procedure, 28 U. S. C. A., Rule 22, Moore's Federal Practice, R. 22:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397 and 2361. Actions under those provisions shall be conducted in accordance with these rules." As amended December 29, 1948, effective October 20, 1949.

A cause of action in interpleader under Rule 22 was stated as the court had jurisdiction even though no diversity of citizenship between the adverse Denham heirs and Fleming. Our present action is one of non-statutory interpleader.

See Barron and Holtzoff, Federal Practice and Procedure, Sec. 552, Jurisdiction:

"The principle difference between Statutory interpleader and non-Statutory interpleader is available if the amount involved exceeds $500 and two or more of the claimants are citizens of different states. The citizenship of the plaintiff is immaterial and unimportant, at least if the plaintiff is a disinterested stakeholder. He may be of the same citizenship as one or more of the claimants, if at least one claimant is a citizen of a different state.

"Non-statutory interpleader, like any other claim for equitable relief, rests upon the same general principles of federal jurisdiction that governs actions of other types. Consequently the same complete diversity of citizenship between the plaintiff and all of the defendants must exist and the amount in controversy exclusive of interest and costs must exceed $3,000."

In support of our contention we refer to the case of *John Hancock Mutual Life Insurance Company* v. *Kraft* (U. S. Court of Appeals, 2nd Circuit 1953), 200 F. 2d 952:

"Interpleader action by insurance company against executors of insured, whose estate had been

made beneficiary of four life policies, and against insured's widow who claimed that she had given insured $42,000.00 in return for promise to make her beneficiary. The insurance company paid proceeds of the policies into court. The United States District Court for the Eastern District of New York Abruzzo, J., granted a temporary restraining order protecting the insurance company against suits in any other court. The executors appealed from order which continued the injunction, directed the executors and widow to interplead among themselves, discharged insurer from liability and denied executors' cross-motion for summary judgment. The Court of Appeals, Swan, Chief Judge, held that the insurance company, as stakeholder, was exposed to double liability and would not be required at its peril to determine whether widow or estate had the better claim, and when diversity existed between the insurance company on the one hand and the wife and the executors on the other hand, the Federal District Court had jurisdiction."

See also *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694. The record disclosed a cause of action and jurisdiction for interpleader of a non-statutory nature.

It also had jurisdiction of the suit as a *cause of action for a declaratory judgment.*

The authorities will support the theory that there was a cause of action and jurisdiction for declaratory judgment under the Declaratory Judgment Act.

The right of bringing an action for Declaratory Judgment is found in Title 28, U. S. C. A. Sec 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, and the District Court of the Territory of Alaska upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890.

Plaintiff's right to have a Declaratory Judgment is clear as appears from reference to Barron and Holtzoff, Federal Practice and Procedure, Sec 1262:

"The purpose of the Declaratory Judgment Act was to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage had accrued."

• • • • • • • • •

Section 1263. Actual, Justiciable Controversy.

"In order to warrant a judgment for declaratory relief, there must be presented a real and substantial controversy between adverse parties and a claim for specific relief.

"The controversy must be 'actual' and justiciable as distinguished from hypothetical, abstract or moot. The word 'actual' as used in the statute is one of emphasis rather than definition. The party claiming declaratory relief must be confronted by a present and real dilemma or danger."

Section 1264. Particular Controversies.

"Much of the doubt and difficulty heretofore connected with actions for declaratory relief will disappear if the action be regarded as an ordinary civil

action, as Rule 57 intends. The incidents of pleadings, process, discovery, trial and judgment are the same. Only where the nature of the factual situation requires, is the prayer or demand for declaratory relief appropriate. The procedure 'is but a normal part of the ordinary civil action.' 'A plaintiff may ask for a declaration either as his sole relief or in addition or auxiliary to other relief, and a defendant may similarly counter-claim therefor. Thus the court is not, as formerly, limited to only remedial relief for defaults already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims, and the right to jury trial is fully preserved as in civil actions generally."

"Consequenty this form of relief is available in the most important and difficult types of cases. For example it is widely used in insurance and patent litigation. In insurance cases declaratory relief may be granted to determine the validity of a policy, the coverage of a liability policy, whether the insurer has waived conditions or provisions of a policy, the liability of the insurer, the extent of liability, the nature and extent of disability and whether the policy has lapsed for non-payment of premiums, ownership, assignment or change of beneficiary, the surrender or exchange of a policy, and other similar questions with respect to insurance."

An action for Declaratory Judgment may be joined with one for Interpleader.

West's Federal Forms, Sec. 4786 sets up a form sanctioned by the Supreme Court of the United States, Official Form 18 in which complaints for Interpleader and Declaratory Relief are permitted. The complaint herein follows this form.

The other authorities we have support jurisdiction in declaratory judgment actions where there is diversity of citizenship between the plaintiff and an actual controversy between the plaintiff and the defendants. In support of jurisdiction, a recent Tenth Circuit case is, as follows *Commercial Standard Insurance Company* v. *Honnour, et al.*, 1956 241 F. 2d 14:

> "Where Texas insurer brought action against additional insured and injured party, both residents of Oklahoma, for declaratory judgment as to whether such insured had breached cooperation clause of automobile liability policy, the insured did not stand in such position of party plaintiff as would defeat federal District Court's diversity's jurisdiction, 28 U. S. C. A., Sec. 2201."

Connecticut Indemnity Company v. *Lee*, 168 F. 2d 420.

> "Where jurisdiction of action under Federal Declaratory Judgment Act, 28 U. S. C. A. former 400 (now 2201 and 2202), to determine whether personal injury action against its insured was covered by Massachusetts compulsory motor vehicle liability policy issued by plaintiff was founded on diversity of citizenship between plaintiff and all defendants, counterclaim by defendant insurance company, which has issued a public liability policy to insured, for a determination that its policy did not cover accident forming basis of personal injury action arose out of same transaction and was ancillary to main action, is that no independent jurisdictional grounds were required to sustain it."

This action on the Donald George Fleming Policy was brought under Rule 22, and under Rule 22 diversity of citizenship is not required between adverse claimants. The only diversity of citizenship that is necessary is diversity

of citizenship between Aetna Life Insurance Company of Connecticut and the defendants all citizens of Oklahoma. Certainly the Court had jurisdiction of the case as a declaratory judgment action which was the Final Judgment that was entered. See (R. 5621, p. 206) Journal Entry of Declaratory Judgment.

Proposition IV of Petitioner.

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335 where the record affirmatively discloses that by their terms the insurance contracts in question are incontestable, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them, concerning any of the terms or conditions of the policies, or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res adjudicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto?

This proposition is mainly a rehash of the Propositions II and III.

Petitioner reasserts that his $33,000 annuity contract is now incontestable by reason of its incontestable clause he still asserts his right to participate in a suit to reclaim the funds that paid the premiums. The record shows there was a real controversy between the plaintiffs in the state court suits seeking recovery of the premiums, these plaintiffs were made defendants in the interpleader action along with other claimants who were claiming the benefits of the insurance contract as annuitants. There was a real controversy and not a fictitious or feigned issue.

The pre-trial judgment did not destroy Donald George Fleming's insurance contract. It held that his contract was a valid contract in full force and effect and orders the Aetna Life Insurance Company to pay the policy when due. (R. 5621, p. 209)

Plaintiff's whole complaint is that when he ratified this contract at the pre-trial and in his pleadings the trial court held he could not proceed with a suit to recover the premiums.

The Present Case Is Not Such a Case as Under the Rules in Its Present Status Justifies *Certiorari*

Rule 19 of this Court is as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character or reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial questions in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A study of the petition fails to show that the present case is brought within the scope of the above rule.

Counsel cites *Louther* v. *New York Life Ins. Co.*, (3 Cir.), 278 Fed. 405, as authority for the proposition that there is a divergence of opinion between the circuits. An examination of this case reveals it was decided in 1918, and Congress has seen fit to give the courts power of injunction both temporary and permanent in the Interpleader Act of 1948.

Permanent injunction in an interpleader action has been upheld in *Haynes* v. *Felder*, U. S. Court of Appeals 5th Circuit 1957, 239 F. 2d 868.

The decision in the case at bar is not in conflict with the *Louther* case.

Conclusion.

The case presented by petitioner does not reveal a situation of special circumstances that justify the granting of the writ in view of the rules of this Court and the long-standing rulings that certiorari is granted only in special circumstances and only in cases of peculiar gravity and general importance. For these and the foregoing reasons it is respectfully urged that the judgment of the United States Court of Appeals for the Tenth Circuit is eminently correct and the application for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 17 1958
HAROLD B. WILLEY, Clerk

No. 365

In The
Supreme Court of the United States

October Term, 1958

DONALD GEORGE FLEMING,
Petitioner,

VERSUS

AETNA LIFE INSURANCE CO. ET AL.,
Respondents.

RESPONSE OF FRANCIS A. RETTENMEYER, EXECUTOR OF THE ESTATE OF JOSEPH A. RETTENMEYER, DECEASED, TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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OCTOBER, 1958.

KING LAW BRIEF CO., COMMERCE EXCHANGE BLDG., OKLAHOMA CITY—PHONE FO 5-2969

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In The
Supreme Court of the United States

October Term, 1958

No. 365

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian,

Petitioner,

VERSUS

AETNA LIFE INSURANCE COMPANY, a Corporation; FRANCIS X. RETTENMEYER, Executor of the Estate of JOSEPH A. RETTENMEYER, Deceased; F. E. PENCE, VIRGIL F. SPRANKLE, GROVER D. STROTHER, A. N. MURPHY, JUSTIN W. FAHERTY, FIRST NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, OKLAHOMA, LEONA HOLCOMB, individually, FRANK T. DENHAM, MAY CECILIA DENHAM, DOROTHY LEE DENHAM, a minor, CAROLYN DENHAM LUMLEY, MAY CECILIA DENHAM, as guardian of DOROTHY LEE DENHAM, a minor, GEORGE DENHAM, CLARENCE DENHAM, MARY JANE HOPKINS, nee SPRIGHT, and MARY ELLEN CASH,

Respondents.

RESPONSE OF FRANCIS X. RETTENMEYER, EXECUTOR OF THE ESTATE OF JOSEPH A. RETTENMEYER, DECEASED, TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

STATEMENT OF THE CASE

The basic facts in this litigation are relatively simple. During her lifetime Rosa B. Wright Rettenmeyer was the owner of certain United States bonds of the approximate value of $191,864.64. These bonds were liquidated and the proceeds used to purchase from the Aetna Life Insurance Company an annuity, being No. AN-33409, for the sum of $162,606; and a single premium policy, being No. AN-1669203 for the sum of approximately $25,000.00. The payments under the first policy above referred to were to be made $1,000 per month to Rosa B. Wright Rettenmeyer during her lifetime. After her death, in event her husband, Joseph A. Rettenmeyer, survived her, the $1,000 monthly payments were to be paid to him; and after his death the $1,000 monthly payments were to be apportioned to her nephews and nieces, when due, as follows:

$123.07	Ellen Cash, niece
123.07	Rufus Denham, nephew
123.07	Marion Denham, nephew
123.08	Lewis Denham, nephew
123.07	Marion Rettenmeyer (widow of Forest Rettenmeyer, nephew)
123.08	Frank X. Rettenmeyer, nephew
123.08	Raymond D. Rettenmeyer, nephew

23.08 Frank T. Denham, nephew
23.08 Edward Denham, nephew
23.08 Clarence M. Denham, nephew
23.08 George N. Denham, nephew
23.08 Leona Denham Holcomb, niece
23.08 Mary Jane Hopkins, niece and adopted daughter.

It is this policy which is the subject of the interpleader action in the United States District Court for the Northern District of Oklahoma in cause No. 3502 by the Aetna Life Insurance Company against all the beneficiaries in said policy. This action was instituted on the 16th day of April, 1954.

Policy No. AN 1669203 on the life of Donald George Fleming became the subject of the action filed by the Aetna Life Insurance Company in the United States District Court for the Northern District of Oklahoma, on the — day of ——— 1954, being Cause No. 3503.

Rosa B. Wright Rettenmeyer died on the 12th day of December, 1952, after having received under the terms of said policy the sum of $24,000.00. The First National Bank and Trust Company of Oklahoma City was appointed executor of her estate, it having been designated as such under the terms of her will and two codicils which were admitted to probate without objection.

Joseph A. Rettenmeyer died on the 22nd day of March, 1954, having received under the terms of said policy fifteen monthly payments of $1,000 each. Francis X. Ret-

tenmeyer, his son, respondent herein was appointed executor of his estate.

On September 30th, 1953, Leona Holcomb, individually, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed. Denham, Frank Denham, George Denham, Clarence Denham, and Mary Jane Wright Hopkins, filed a suit in the District Court of Creek County, Oklahoma, being cause No. 29092, against Joseph A. Rettenmeyer, the Aetna Life Insurance Company and others to recover the money derived from the bonds used to purchase Aetna Policy No. AN-33409; and on October 21st, 1953, the same parties instituted cause No. 29114 against Joseph A. Rettenmeyer, the Aetna Life Insurance Company and others, to recover the money derived from the bonds used to purchase Aetna policy No. 1669203; and on April 15th, 1954, they instituted cause No. 87402 in the District Court of Tulsa County, Oklahoma, against Joseph A. Rettenmeyer, the Aetna Life Insurance Company and others, to recover damages and punitive damages for the alleged conversion of the bonds which had been used to purchase both of the above referred to Aetna policies. For convenience, these parties shall hereafter be referred to as the Denhams.

Although case No. 87402 was pending at the time Aetna filed its complaint in interpleader in cause No. 3502, no specific mention was made of that case in the original temporary injunction issued by the trial court on April

16th, 1954. Thereafter, on June 23, 1954, Aetna filed its amendment to complaint in interpleader in case No. 3502 in which it specifically referred to case No. 87402 and attached a copy of the petition in case No. 87402 as a part of the amendment (Tr. 2—Reproduced Record Case No. 5056, In the United States Court of Appeals, pages 69 to 72).)

On November 12, 1954, the trial court entered an "Order Construing Restraining Order Heretofore Made" which was filed in case number 3502 on November 22, 1954. This order is referred to at page 3 of the transcript and is set forth at page 77 of the reproduced record in case number 5056. In that order, the trial court specifically enjoined the Denhams from prosecuting case number 87402 against Aetna in the following language, to-wit:

> "It is ordered, adjudged and decreed that the defendants Leona Holcomb, . . . be and they are hereby enjoined, and restrained from instituting any suit in any State Court, . . . and enjoins and restrains the prosecution of any suits or causes of actions against the plaintiff, Aetna Life Insurance Company including particularly, cause No. 29092 in the District Court of Creek County, State of Oklahoma, styled *Leona Holcomb et al.* v. *Aetna Life Insurance Company et al.*, and cause No. 87402 in the District Court of Tulsa County, State of Oklahoma, entitled, *Mary Jane Hopkins et al.* v. *Aetna Life Insurance Company et al.*, . . ."

On November 30, 1954, the Denhams filed their "Notice of Appeal" from this order, which notice contained the following language, to-wit:

> "Notice is hereby given plaintiff, Aetna Life Insurance Company, a corporation, that defendants (Denhams) hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Order entered herein on the 22nd day of November, 1954, enjoining and restraining the prosecution of Cause No. 87402 in the District Court of Tulsa County, State of Oklahoma, entitled *Mary Jane Hopkins et al. v. Aetna Life Insurance Company et al.*, which Order is entitled 'Order Construing Restraining Order Heretofore Made'."

Thus, a direct issue was made in the Circuit Court as to the validity of the injunction issued by the trial court against the prosecution of case number 87402 by the Denhams as against Aetna. On August 3, 1955, an order was filed in the United States Court of Appeals in case number 5056 affirming the order of the trial court filed on November 22, 1954, in case number 3502 enjoining the prosecution of case number 87402 by the Denhams as against Aetna. Certiorari was subsequently denied by the Supreme Court and the facts and law determined in this phase of the case became finally adjudicated and are reported as the case of *Holcomb* v. *Aetna Life Insurance Company*, 228 F. 2d 75.

It will be recalled that while Francis X. Rettenmeyer, individually, was an original party to case number 3502 as a defendant, Francis X. Rettenmeyer, as executor, was not originally a party. On September 23, 1954, Francis X. Rettenmeyer, executor of the estate of Joseph A. Rettenmeyer, deceased, filed his motion for leave to

intervene and complaint in intervention which are referred to at page 3 of the tra script and set forth at page 76 of the reproduced record in case No. 5056. On November 19, 1954, the Honorable Royce H. Savage as trial judge in case number 3502 entered an order therein allowing Francis X. Rettenmeyer, executor, to intervene in that case *as of right*. This order was filed in the case on December 15, 1954, and is set forth at pages 3 and 4 of the transcript. It was unappealed and thus has become final.

Thereafter, Francis X. Rettenmeyer, executor, filed his application for a temporary injunction prohibiting the Denhams from prosecuting case number 87402 against him, and on July 25, 1956, the trial court entered a "Decree of Preliminary Injunction" in case number 3502 enjoining the Denhams from prosecuting case number 87402 against Francis X. Rettenmeyer, executor, pending the trial of case number 3502, which order is set forth at pages 30 to 33 of the transcript. Thereafter, this injunction was made permanent by judgment entered in case number 3502 on December 10, 1956, and filed therein on January 14, 1957, which appears at pages 46 to 52 of the transcript.

In view of the pleadings filed herein, and in cases numbered 3502, 3503, 29092, 29114 and 87402 by the various parties hereto; the admissions and stipulations of the various parties hereto in the pre-trial proceedings in case number 3502, and in other proceedings; and the

decision of this Court in the case of *Holcomb* v. *Aetna Life Insurance Company*, 228 F. 2d 75, it is assumed that the following are adjudicated or otherwise established as facts or law of this case:

1. The United States bonds described in the petition of plaintiffs in case number 87402 for the alleged conversion of which that action is prosecuted, are the bonds which were sold, and the proceeds of which were used to purchase Aetna Life Insurance Company policies numbered AN33409 and AN1-669-203.

2. Aetna has the right to maintain its interpleader actions in cases numbered 3502 and 3503 against the defendants named therein.

3. Aetna is entitled to an injunction prohibiting the plaintiffs in case number 87402 from prosecuting that action against it.

This then left but two questions for the Appellate Court to consider in deciding the correctness of the trial court's judgment as to that appellee:

1. Did the trial court properly permit Francis X. Rettenmeyer, executor, to intervene in case number 3502?

2. Did the trial court correctly enjoin the plaintiffs in case number 87402 from prosecuting that case against Francis X. Rettenmeyer, executor?

Both of these questions were resolved by the United States Court of Appeals for the Tenth Circuit in its opinion filed in Causes Nos. 5620 and 5621, on May 12th, 1958, affirming the judgment of the trial court. It is this judgment which petitioner now seeks to review.

ARGUMENT AND AUTHORITIES

If we understand the brief of petitioner no issue is raised as to the right of Francis X. Rettenmeyer as Executor to intervene in the trial court. For this reason we shall confine ourselves to a presentation of the correctness of the judgment of the court in enjoining the Denhams from prosecuting Cause No. 87402 in the District Court of Tulsa County, Oklahoma, against Francis X. Rettenmeyer as executor of the estate of Joseph A. Rettenmeyer, deceased.

-1-

The United States Court of Appeals, Tenth Circuit, properly affirmed the Judgment of the United States District Court enjoining the Denhams from prosecuting cause No. 87402 against Francis X. Rettenmeyer, as executor.

As has already been stated, it is assumed as a premise for the argument of this appellee that the trial court properly permanently enjoined these Denhams from prosecuting case number 87402 against Aetna. If for no other reason it became the law of this case when the decision of the Appellate Court in *Holcomb* v. *Aetna Life Insurance Company* 228 F. 2d 75 became final that:

(1) Aetna has the right to maintain an interpleader action as pleaded in case number 3502; and

(2) The temporary injunction in favor of Aetna against the prosecution of case number 87402 by the Denhams was properly granted.

It is a legal truism that a temporary injunction is based upon the pleadings, and inherent in any order issuing such an injunction is the judgment that should the party in whose favor the temporary injunction is granted establish his case as pleaded, he will be entitled to have that temporary injunction made permanent. Thus, if it be the law of this case that the trial court properly issued the temporary injunction against the prosecution of case number 87402 by the Denhams as against Aetna, it must also be the law of the case if Aetna established its case as pleaded, then Aetna is entitled to have the injunction made permanent. This is exactly what has happened. At the pre-trial proceedings in case number 3502 Judge Savage repeatedly attempted to get counsel for the Denhams to tender an issue as to the validity of the annuity policy which was the subject of that action. This they declined to do. In fact, Mr. Glenn O. Young, of counsel for the Denhams, made this statement at pre-trial, to-wit:

> "Now we assert here that there isn't any controversy between anybody, that the issuance of the policy —we say it was issued by Aetna; we say it is incontestable. We say there is no conflict among the parties who are designated as annuitants, as to who receives what. There is nothing under the policy that is in controversy at all. The beneficiaries under the policy —the identity of them is established. None of them are contending that the policy is invalid—they are not contending that one is entitled to a little more or a little less; they are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Rettenmeyer—no such question is involved."

Therefore, the following colloquoy occurred between the court and Mr. Young, to wit (Tr. page 140):

> THE COURT: "• • • It is my view that the burden is not on Aetna to go forward with the proof, with the alleged—with respect to the alleged conversion of these bonds. We get into that question only in the event you tender the issue, in my judgment.
>
> MR. GLENN O. YOUNG: Aetna has not tendered that issue; neither have we."

Of course, both annuity policies were included as is reflected by the statement of the court at page 142 of the transcript, to-wit:

> THE COURT: "All right, I am going to enter judgment accordingly in both cases on both contracts, of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay to Fleming in accordance with the terms thereof, or to the beneficiaries in accordance with the terms thereof, and I believe the only—Donald George Fleming is the—
>
> MR. WOOLSEY: He is the beneficiary.
>
> THE COURT: Beneficiary under the contract."

Thus, on pre-trial when counsel for Denhams admitted that no issue was raised as to the conversion of the bonds by him and that the Aetna policy was a valid policy, Aetna had established its case; there was no fact issue left in the case.

It is our position that the same rule applied to Francis X. Rettenmeyer, executor. The temporary injunction

prohibiting the Denhams from prosecuting case number 87402 as against Francis X. Rettenmeyer, executor, was properly issued by the trial court; and, as in the case of Aetna, the pre-trial proceedings disposed of any fact issues between the parties so there was nothing left to do but for the trial court to make the injunction permanent.

The key to the problem is whether a final decision in case number 3502 will resolve the issues of case number 87402 between Francis X. Rettenmeyer, executor, and the Denhams. The essential fact on this issue is the identity of the bonds which purchased the annuities which are the subject of cases numbered 3502 and 3503, respectively, and those bonds the alleged conversion of which are the subject of case number 87402. Despite the protestations of counsel for the Denhams to the contrary, their own pleadings in cases numbered 3502, 29092, 29111 and 87402 establish this as a fact; and the decision of this Court in the case of *Holcomb v. Aetna Life Insurance Company*, 228 F. 2d 75, upon the issues raised in that case as set forth hereinbefore finally adjudicated it as a fact that the bonds in each case were one and the same. Thus, it is an established, adjudicated fact of this case that the bonds used to purchase the two annuity policies which are the subjects of cases numbered 3502 and 3503, respectively, are those same, identical bonds the alleged conversion of which are the subject of case number 87402.

The only fact issues in cause number 87402 are (1) whether Rosa B. Wright Rettenmeyer was competent to transact business at the time these policies were purchased; and (2) whether the proceeds from these bonds were used to purchase these policies with her knowledge and consent, or, whether she was overreached or defrauded in some manner in the transaction. Since the ultimate issue in case number 3502 is the validity of the annuity, these are also the only fact issues in that case. Before the trial court could make a determination as to the validity or invalidity of these policies, it had to dispose of the above issues, and in so doing it disposed of every issue in case number 87402. When counsel not only declined to render any issue on the pre-trial hearing of case number 3502, but as set forth above admitted that no issue was tendered as to the conversion of the bonds and further admitted the validity of the policy, all of the issues in case number 87402 were also resolved.

There was yet another factor to be considered in this matter. All of the beneficiaries under the annuity contract were parties to case number 3502 civil. The defendants Ellen Cash, Rufus Denham, Marion Denham and Louis Denham are not even parties to cause number 87402 and defendants Francis X. Rettenmeyer, Raymond D. Rettenmeyer and Marion Rettenmeyer although parties to that cause have not been served with summons. As they are non-residents of Oklahoma, it is highly doubtful that the

District Court of Tulsa County ever will acquire jurisdiction over them in that action. Thus, these parties will not and cannot be bound by a judgment in cause number 87402. The possibilities inherent in such a situation are obvious. A judgment might be obtained in case number 87402 which would be binding upon the parties to that case, but it would still be necessary to try case number 3502 civil because a judgment in case number 87402 could not bind the parties in case number 3502 civil who were not parties to case number 87402. It is conceivable that the court in case number 3502 civil on the same issues could enter a judgment directly contrary to the judgment in case number 87402. Thus, some of the beneficiaries under the annuity who were parties to case number 87402 would be bound by that judgment, whereas, other beneficiaries who were not parties to that action might be bound by a different judgment in another court—and all claiming under the same annuity contract. Manifestly, the litigation of the same controlling issues in different suits, in different courts with different parties would be an inefficient and disorderly administration of justice. The trial court properly prevented such judicial chaos by enjoining further proceedings in case number 87402.

In order to prevent needless friction between State and Federal courts Congress has adopted the policy that Federal courts, as a general rule, may not stay proceedings in State courts. This policy is enunciated in 28 U. S. C. A. § 2283 as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This Court is, of course, aware of this Statute and is familiar with the three exceptions to its operation. Francis X. Rettenmeyer, executor, was entitled to an injunction under the first of these exceptions. A stay order is expressly authorized by an Act of Congress as is provided in 28 U. S. C. A. 2361 as follows:

"In any civil action of interpleader or in the nature of interpleader under Section 1335 of this Title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceedings in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs and shall be addressed to and served by the United States marshall for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

Case number 3502 was certainly an action under Section 1335 and there can be no question that the action in cause number 87402 is one "affecting the property, instrument or obligation involved in the interpleader action."

In the case of *Tremies* v. *Sunshine Mining Co.*, 60 S. Ct. 11, 308 U. S. 66, 84 L. Ed. 85, the Superior Court of

Spokane County, Washington, awarded certain stock of the Sunshine Mining Company belonging to the estate of Amelia Pelkes to John Pelkes and his assignee, Evelyn Treinies. The district court of Shoshone County, Idaho, awarded this same stock to Katherine Mason. Treinies and Pelkes then filed suit against Mason in the Superior Court of Washington to quiet title to the stock and joined Sunshine as a party defendant. Sunshine then commenced an interpleader action and further proceedings in the quiet title suit were enjoined. Upon appeal to the Supreme Court of the United States it was held:

> "Neither are the provisions of Section 265 of the Judicial Code, 28 U. S. C. A. 379, applicable. That Section forbids a United States Court from staying proceedings in any State court. The Interpleader Act, passed subsequently, however, authorizes the enjoining parties to the interpleader from further prosecuting any suit in any State or United States court on account of the property involved. Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power."

In the case of *National Fire Ins. Co. v. Sanders* (C. C. A.—5th), 38 F. 2d 212, 214, 215, one W. D. Sanders was the owner of a house in De Kolb, Texas, which burned. The loss was adjusted by National at $7,850.00. After the fire but before adjustment, Armour Fertilizer Works filed suit in the municipal court of Chicago against Sanders on certain notes. A default judgment was obtained and garnishment proceedings instituted against National. Sanders advised National that the insurance proceeds were exempt

under Texas laws because the house was his homestead. National filed its bill in Federal Court impleading Armour and Sanders. The court held:

> "As to the first-mentioned conclusion, reliance is had on *Calloway* v. *Miles* (C. C. A.), 30 F. 2d 14. It may be conceded that the Statute does not enlarge the equitable right of interpleader, but neither does it restrict it. It is not necessary to seek any enlargement of equitable right from the Statute in this case. It is a fundamental principle of interpleader that its office is not so much to protect a party against double liability as against double vexation in respect to one liability. It is immaterial whether the danger apprehended comes from suits pending or merely threatened. In either case, a court of equity having jurisdiction over the parties may enjoin the institution or further prosecution of the suits and grant adequate relief to the stakeholder and adverse claimants to the fund. Pomeroy's Equity Jurisprudence (4th Ed.) par. 1320. Street's Federal Equity Practice, par. 2236. *Calloway* v. *Miles*, *supra*, is not persuasive as it does not give the effect to the fundamental principle of interpleader, that a bill will be to protect a party against double vexation.
>
> * * * * * * * * *
>
> Furthermore, it is well settled that a Federal court may issue an injunction to the parties litigant in a State court in order to preserve its jurisdiction properly attaching."

Perhaps the best example of the court restraining one impleaded party from prosecuting another in some other forum is the case of *Maryland Casualty Co.* v. *Glassell-Taylor & Anderson*, 68 F. Supp. 897, 898, 900. This was an action in the nature of interpleader by the Maryland Casualty Company against Glassell-Taylor & Robinson, a

partnership, John W. Harris, Inc. and others. Harris filed its answer and a cross claim against Glassell-Taylor & Robinson praying, among other things, for an injunction against Glassell-Taylor & Robinson staying prosecution of a suit by them against Harris in a State court of Louisiana. The court held:

> "The effect of the injunction granted the Casualty Co. in the present suit was to stay the several actions enumerated in the opinions of this court and the Court of Appeals, both in the State court and the Federal Court for the Eastern District of Louisiana, insofar as that company was concerned, but left the plaintiffs therein free to prosecute their claims to judgment against all others save the surety company."

From this it can be seen that the situation there was very similar to that in case number 3502. After discussing the reasons for granting such an injunction, the court stated in the last paragraph of its opinion as follows:

> "In view of the complication thus produced by the maintenance of the proceedings here while leaving those in the State court and the Federal Court for the Eastern District of Louisiana to be pursued, I feel constrained to grant the injunction sought by counter claimant, Harris, against Glassell and Workman."

Doubtlessly there is a dearth of authority on the particular question of whether the impleaded parties have the same right to have further proceedings in another forum involving the same issues as the interpleader action enjoined as against each other as the party instituting the interpleader action has against the impleaded parties be

cause the statutory language and logic itself dictate such a construction of the Statute. It is respectfully urged that to construe the Statute as authorizing the court to enjoin the parties impleaded from proceeding against the party instituting the interpleader action, but not as against each other would be an absurdity. Such a situation defeats the very purpose of the act which is to have the parties litigate their common issues in one forum and to avoid a multiplicity of lawsuits with its attendant confusion and possible conflicting judgments. It is further urged that as a party who intervened in case number 3502 as a matter of right Francis X. Rettenmeyer, executor, stood in the same position in this respect as the original parties in the case and that the same right to a stay of further proceedings against him in case number 87402 as did Aetna Life Insurance Company.

CONCLUSION

This case serves as a classic example of the situation which the Federal Statutes permitting interpleader and injunction against the proceedings in other cases were designed to remedy. The only basic issue which ever did exist in all of the cases 3502, 3503, 29092, 29114, and 87402 was simply whether the bonds of Rosa B. Wright Rettenmeyer used to purchase Aetna annuity policies AN33409 and AN1,669 302 were rightfully or wrongfully so used, and the pre-trial proceedings in cases 3502 and

3503 have definitely established that they were rightfully so used. Yet upon this basic issue three different suits were filed in two different District Courts of the State of Oklahoma. Not only was the United States Court for the Northern District of Oklahoma one that could give relief with the least amount of litigation, but in this situation it was the only court which could give complete relief. As aforesaid, Ellen Cash, Rufus Denham, Marion Denham and Louis Denham are not even parties to case number 87402 and Francis X. Rettenmeyer, individually, Raymond D. Rettenmeyer, and Marion Rettenmeyer, have not been served with process in case number 87402 and the court has not obtained jurisdiction over them in that case. As the latter group are non-residents of the State of Oklahoma, doubtlessly, it never will. However, the court in case number 3502 does have jurisdiction over all of these parties. Thus, regardless of what happens in case number 87402, case number 3502 had to be decided in order to adjudicate the rights of all parties. Therefore, not only is there a multiplicity of suits unless the prosecution of case number 87402 is enjoined, there even exists the possibility of conflicting judgments. Such an abhorent situation can be and has been prevented by the judgment of the trial court in case number 3502, and the United States Court of Appeals in cases Nos. 5620 and 5621, and it is respectfully urged that this judgment should be sus

tained by this Court, and the petition for certiorari should be denied.

Respectfully submitted,

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MORAUL BOSONETTO,
Sapulpa, Oklahoma.
Attorneys for Respondent, Francis X. Rettenmeyer, as Executor of the Estate of Joseph A. Rettenmeyer, Deceased.

OCTOBER, 1958.

FILE COPY

F I
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JAMES

No. 365

In the Supreme Court of the United States

October Term, 1958.

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, *nee* Wright, and Mary Ellen Cash, *Respondents*.

REPLY BRIEF.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No. 365

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, *nee* Wright, and Mary Ellen Cash, *Respondents*.

REPLY BRIEF

It is difficult to conceive of cases more clearly evidencing departure from the accepted and usual course of judicial procedure, and denial of due process of law than in the two separate cases complained of herein, in each of which Aetna and the interveners were each and all granted two separate injunctions to accomplish a single object and purpose, *viz.*, to summarily enjoin this appellant from prosecuting cause No. 87402 in the District Court of Tulsa County, Oklahoma.

Careful examination of the briefs of respondent Aetna, (the plaintiff in each of said cases) and of intervener Francis X. Rettenmeyer, executor of the estate of Joseph A. Rettenmeyer (who alone of the many interveners has filed a response), confirms and buttresses rather than disproves the basic grounds relied upon for issuance of the writ of certiorari.

These briefs admit and concede that the injunctions were issued without evidence. At page 51, Aetna premises an otherwise irrelevant statement by the express words "although there was no evidence introduced * * *."

The petitioner, Fleming, respectfully urges this Court to note that nowhere is there *evidence or pleadings* to refute or modify Aetna's own exhibit (included photostatically at the last page of the petition for certiorari herein). His signing this exhibit and the issuance by Aetna of its policy based thereon constitutes the sole and only transaction which constituted any shadow of a basis for any cause of action in interpleader in the federal court. The exhibit discloses that when petitioner was 11 years old, he signed an application to Aetna Life Insurance Company for a single premium, fifteen year endowment policy, under the terms of which if he was living at the end of fifteen years and the policy had not been earlier surrendered for cash by Joseph A. Rettenmeyer, the company would become obligated to pay petitionr $33,000 in monthly installments.

The policy was to be payable in event of the death of petitioner to Joseph A. Rettenmeyer, a step-great-uncle who was described as "uncle" in the application.

The application recited that the single premium of $25,143.05 was to be paid from the funds of Rosa B. Wright Rettenmeyer by Joseph A. Rettenmeyer, "Atty. in Fact." There is no allegation that Fleming was consulted in regard to how, when or by whom this premium was to be paid.

The signature of the applicant was witnessed by F. E. Pence, Agent of Aetna. The application was dated Oct. 9, 1950.

There is positively nothing in the application to indicate that the premium on this policy was to be paid from registered United States Bonds then safely secreted in the private safety deposit box of Rosa B. Wright Rettenmeyer, whose mental and physical condition was such that, as the briefs concede and the application, shows her affairs actually were being conducted, not by her in person, but by "Joseph A. Rettenmeyer, Atty. in Fact."

The circumstance that with Rosa B. Wright Rettenmeyer mortally ill, Joseph A. Rettenmeyer would be using her funds to insure the life of petitioner for J. A. Rettenmeyer's own benefit and advantage in itself should be sufficient to raise doubts concerning his rights to injunctive relief in equity in any subsequent litigation growing out of that transaction.

Provisions in the policy issued, vested in Joseph A. Rettenmeyer authority to reclaim substantially the whole of this premium at his pleasure, at any time before its maturity.

Under Oklahoma law, a transaction by a trustee or agent whereby he derives benefit at the expense of the principal or *cestui que trust* is presumed void.

> "No trustee shall directly or indirectly buy or sell any property for the trust * * * from or to himself, a relative, employer, partner, or other business associate * * *." 60 O. S. A. 175.11

J. A. Rettenmeyer was not only acting as agent and trustee under Power of Attorney; he was also husband of Rosa B. Wright Rettenmeyer and as such dealing with her separate estate. The transactions by virtue of this relationship are also voidable.

Johnston v. *McCray*, 122 Okl. 301, 254 Pac. 979;
Weitz v. *Moulden*, 109 Okl. 119, 234 Pac. 583;
McDaniel v. *Schroeder*, 128 Okl. 91, 261 Pac. 224;
Teague v. *Murphy*, 91 Okl. 116, 216 Pac. 475.

The application was dated Oct. 9, 1950 and Aetna issued its policy conformable thereto. *That this transaction was complete—the policy executed and delivered before the conversion (Oct. 31, 1950) complained of in state court suit No. 87402 occurred is clear from the pleadings and the briefs.*

Nothing, whatever, justifies an inference that petitioner, an eleven-year-old school boy, then agreed or consented or knew that $191,864.64 in value of bonds, then in the private safety deposit box of his testatrix, and in which he had under her will a contingent interest, were to be withdrawn, endorsed by someone with an "X" and the proceeds used in part to provide further benefits to Joseph A. Rettenmeyer in the sum of $1,000.00 per month for life, as well as contingent benefits to his own heirs in event of his death.

The briefs of both respondents are devoted largely to efforts to supply evidence which admittedly was never offered at the trial. The briefs fail to explain in what manner or by what process of reasoning it was decided that Aetna and the interveners were all entitled to injunctions preventing petitioner from prosecuting cause No. 87,402 for damages for wrongful conversion of assets of the estate of petitioner's testatrix.

No payment had been made or tendered by Aetna to anyone under the only policy which provided even contingent benefits to this petitioner.

No one other than petitioner who might have asserted an interest in this policy was a party to either suit in the federal court. There was, therefore, no possible ground of jurisdiction in interpleader in the federal court in either suit in favor of Aetna or the interveners since no question of *double liability* or conflicting claims was involved.

Petitioner, as the record and briefs show, was neither directly nor indirectly a party to any other policy contract with Aetna than that issued conformable to the application of Oct. 9, 1950.

Both respondents in their briefs attempt to supply lack of evidence by garbled and incomplete excerpts from statements and admissions of the petitioner's attorneys. The most casual examination of these statements will clearly show that at no time was any statement made under any condition calculated to, which did or could forfeit the rights of this petitioner, who is still a minor and under guardianship, to prosecute the suit for damages which he had filed and which remains pending in the state court.

The contention that statements of counsel at sometime in the long course of this litigation in the federal court constitute an admission, and waiver of necessity of proof is clearly an afterthought.

This may be readily determined by examination of the record of proceedings at the pre-trial, as printed and set forth in the brief of respondent Aetna. After a long and tedious recitation of what he claimed evidence would be introduced to prove, Aetna's attorneys declare:

> "Then a colloquy took pace between the court and Mr. Young in which the court reviewed the litigation and the contentions of the parties (R. 5620 p. 134:

> > 'The Court: * * * And it has been my intention in entering the orders that have heretofore been entered to require the parties who are defendants here, who are among the beneficiaries of the annuity contract and who are likewise plaintiffs in the suit pending in the District Court of Tulsa County, to assert here in this court, if they choose to do so, whatever claims they may have, not only against the Aetna, but against the other parties defendant in the pending case in the District Court of Tulsa County.

> > 'Now, of course I cannot require the parties to assert the claim here. I can only require that the claim be asserted here, or otherwise suffer a ruling to be made by the court which would in my judgment be *res adjudicata*, with respect to the

issues joined now in the District Court of Tulsa County'."

Surely there's nothing herein to indicate that statements and admissions of petitioner's attorneys were considered to obviate need for evidence or constitute waiver of proof as well as pleadings. Suggestion that a judgment would be "*res adjudicata*" clearly evidences a purpose of the United States District Court to decide issues in cause No. 87,402.

The U. S. District Court specifically recognized that *no pleading by any party in either case in the federal court invoked jurisdiction of the federal court to decide cause No. 87,402*:

> "Now I note from the answers filed by our clients —on behalf of your clients, Mr. Young, that there is apparently no attempt to join issue here in this case on the alleged cause of action plead and asserted in the District Court of Tulsa County. It appears to me that the answer filed on behalf of your clients is intended to reassert, reallege, and restate the position that you have taken all along, that this Court has no jurisdiction to pass upon the issues which are joined between the parties in the District Court of Tulsa County."

After further discussion, the court said:

> "And it is further my view that if you dont tender the issue here and litigate it here that it will be necessary for this court to enter a judgment which will attempt to foreclose you with respect to that issue." (Aetna's brief, page 33)

With further regard to respondent's present contention that the pleadings and statements of counsel constituted

admissions justifying a judgment in the federal court purporting to determine without evidence cause No. 87,402, this court's attention is respectfully invited to the following admitted excerpt from the record at pre-trial: (See Respondent Aetna's brief, page 36)

> "Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?
>
> "The Court: Yes, I think I am.
>
> "Mr. Glenn O. Young: And specifically denied it?
>
> "The Court: I think I am aware of that."

The basis of the Court's two injunctions is further revealed by a statement from the record, quoted by Aetna in its brief, page 37, as follows:

> "The Court: The court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicata.*"

Thus it will be noted from the record that *only at the time of judgment was petitioner informed that res adjudicata was considered an issue* or *relevant to any issue* pending in either case in the federal court.

Since the theory was advanced by the pre-trial judge *sua sponte*, appellants had no oportunity to defend against such a plea, either by pleading or evidence.

> "An issue must have been decided before it can come within scope of *res adjudicata.*" *Pierce v. Kimbell*, 151 F. 2d 897, certiorari denied 66 S. Ct. 821, 327 U. S. 793, 90 L. Ed. 1020."

"The doctrine of '*res judicata*' is that a final judgment of a court of competent jurisdiction upon a matter properly before it concludes the parties in a subsequent action or proceeding." *Huddleston* v. *Ingyr*, 137 F. 2d 383, vacated 64 S. Ct. 1175, 322 U. S. 232, 88 L. Ed. 1246.

"A decision, findings of fact and conclusions of law are the basis on which judgment of court rests." *Lamboss* v. *Young*, 145 F. 2d 341; 79 U. S. App. D. C. 274.

"In the absence of notice to a party of claim made against him and of a hearing or opportunity to be heard in opposition thereto, a judgment entered upon a claim is a nullity." *Sylvan Beach* v. *Kock*, 140 F. 2d 852.

In adopting the *res judicata* theory to prevent trial of 87,402, the pre-trial judge disregarded the settled law that if *res judicata* had any pertinency to the proceedings in this case whatever, by it the court below was precluded from granting a second injunction against this appellant and in favor of Aetna and Pence. The identical relief had been granted already in a companion case not only decided that date but as part and parcel of that very proceeding.

"The general rule of *res judicata* applies to repetitious suits involving the same cause of action and rests upon consideration of economy of judicial time and public policy favoring establishment of certainty in legal relations." *C. I. R.* v. *Sunnen*, 68 S. Ct. 715, 333 U. S. 51, 92 L. Ed. 898

"Purpose of the principle of *res judicata* is to end litigation, the theory being that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate." *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d

464, certiorari denied 71 S. Ct. 743, 341 U. S. 921, 95 L. Ed. 1355.

The iniquity of permitting a litigant to claim the identical relief in two separate and distinct law suits instituted for the same object is most obvious in a case such as that at bar. To free himself from either injunction, the petitioner must successfully prosecute, not *one*, but *two* appeals with the consequent expense of attorneys' fees, printing bills, court costs, etc., etc. Paradoxically both Aetna's suits were premised upon its demonstrably fallacious contention that failure of the U. S. Court to permit both interpleader and a declaratory judgment suit for the same relief might subject it to duplicitous claims upon a single liability.

Once the practice of permitting entry by the same court on the same day of two different injunctions for the same purpose in two separate lawsuits, is approved, may it not reasonably follow that to really make costs of an appeal prohibitive even more, say four or six might be approved in other cases?

If the first injunction entered was firm and sound, after all what was the need of the second? Was the purpose of Aetna, Pence and Company based upon an assumption that if they missed Fleming with the broad-ax, they might perchance still smite him dead with the sword? If the purpose of some four years legal jujitsu in the Northern District has been to avoid involving *Aetna* in duplicitous lawsuits how much simpler the object might have been obtained by merely dismissing its wholly fictitious and unfounded

claims that *disagreements existed among beneficiaries under its incontestable policy contract*, thereby requiring it and its confederates in the federal court to defend cause No. 87402 in the court where that suit is still pending?

Irrespective of the issues here, matters of attorneys' fees, costs, etc., as well as claims for both actual and punitive damages remain undisposed of in 87402. Of $191,864.64 worth of bonds converted, only $25,143.05 could possibly have found its way into any policy contract in which this petitioner was interested or a party.

In the long course of this litigation Fleming has been a most reluctant and unwilling gladiator in a judicial arena against an amazingly large number of brilliant, versatile and resourceful lawyers. No one of them ever volunteered the suggestion that the issues in 87402 were *res adjudicata* or that at pre-trial, when the summary injunctions were entered, the case was "ripe for judgment."

While it is not germain to the issue here, the suggestion is respectfully advanced that upon the whole record Aetna and its confederates, if they had a good defense against the claim asserted by this appellant in cause No. 87402, have certainly gone to most extraordinary labor, trouble and expense to avoid revealing it forthrightly in any court and defending it in the only court where that claim has ever been asserted. The charge that Aetna and interveners wrongfully converted on October 31, 1950, bonds from the private safe deposit box of an aged and incapacitated and incompetent old woman made in 87402 was not denied in the cases here. That issue has never been tried in any court.

Involved is the undetermined legal question of whether *one who wrongfully converts funds of another, may absolve himself from all liability by the simple process of investing part of the money in an insurance contract payable to himself.*

Every consideration of sound public policy seems to support the right of this appellant to his day in court with at least the opportunity to try his lawsuit where it is still pending without risk of being committed for contempt.

Opinion of Tenth Circuit in Conflict with *Lowther* v. *New York Life Ins. Co.*, 278 Fed. 405.

In denying, without comment, that the decision in the case at bar is in conflict with the *Lowther* case, respondent Aetna overlooks and disregards the basis upon which the Lowther case was premised. The *Lowther* case followed *Wells, Fargo & Co.* v. *Taylor*, 254 U. S. 183, 41 Sup. Ct. 93, 65 L. ed. 205, by this Court, wherein the power of the federal court to enjoin actions previously instituted in a state court of competent jurisdiction, was denied upon the ground that "it tends to prevent unseemly interference with orderly disposal of litigation in the state courts and is salutary."

There is nothing in the Interpleader Acts which evidences an intent of the Congress to alter salutary and wholesome public policy established by this Court itself, or to invite litigants to use interpleader in federal courts as a ruse, pretext and excuse for invading the prior jurisdiction of state courts in pending cases, not to hear and determine issues upon pleadings and evidence, but to en-

litigation without due process of law by merely enjoining further prosecution of it.

A further issue is whether the federal court, even if it might lawfully enjoin petitioner once, had authority to enter another and different injunction granting the same relief to the same party, all without any evidence or pleadings. Neither pleadings or evidence or the briefs of either respondent establish that:

1. Aetna had a cause of action for interpleader warranting exercise of jurisdiction by the U. S. District Court, or,
2. That the interveners, or either of them, had a cause of action for interpleader or any other relief within the jurisdiction of the federal court.

Absent some showing by pleadings or evidence of the existence of a cause of action in the nature of interpleader against this petitioner in either case, it is clear legislation subsequent to the *Lowther* case could not alter the salutary rule it announced.

The decision of the Tenth Circuit not only conflicts with the *Lowther* case; it is contrary to the decision of this Court upon which the *Lowther* case is based.

Conclusion.

The issue here, as clearly revealed by the record, transcends, however, any question of conflicting federal or state jurisdiction.

The record discloses, and unequivocally, that the petitioner, Donald George Fleming, having in due course instituted in the District Court of Tulsa County, Oklahoma, cause No. 87402, to recover damages for a wrongful entry into the private safety deposit box of his great aunt, under whose will he was legatee, and the removal and conversion of U. S. Bonds, worth $191,864.64, has been twice enjoined from the prosecution of said suit by the U. S. District Court for the Northern District of Oklahoma.

Each injunction was issued at a pre-trial conference.

The record clearly discloses that the pre-trial judge expressly recognized that no issues were raised by any pleadings in the federal court concerning the merits of cause No. 87402. No evidence was offered. No trial was had.

The Tenth Circuit Court of Appeals (although recognizing a conflict between its decision and the *Louther* case by the Third Circuit) obscured the controlling issues and attempted loosely to justify the injunction complained of upon the ground of subsequent legislation governing interpleader. No effort was made to show in what manner this legislation altered the basic and salutary policies enunciated by this, the Supreme Court of the United States, and followed in the Third Circuit.

Issuance of two injunctions under the circumstances constitutes abuse and misuse of judicial authority, denial of all the essentials of due process of law and such wide departure from the usual and ordinary judicial processes as in the considered opinion of the undersigned to warrant this Honorable Court in issuance of its Writ of Certiorari.

Respectfully submitted,

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FILE COPY

No. 365

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In the Supreme Court of the United States

October Term, 1958.

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BRIEF OF RESPONDENTS, FIRST NATIONAL BANK AND TRUST COMPANY, OKLAHOMA CITY, OKLAHOMA, VIRGIL F. SPRANKLE, GROVER D. STROTHER, A. N. MURPHY, JUSTIN H. FAHERTY, IN OPPOSITION TO PETITION FOR CERTIORARI.

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Introduction.

Respondents, First National Bank and Trust Company of Oklahoma City, Oklahoma, Virgil F. Sprankle,

Grover D. Strother, A. N. Murphy, and Justin W. Faherty, adopt the statements of the case and the outline of facts as set out in Brief of Respondent, Aetna Life Insurance Company, as if made a part of this brief.

Rosa B. Wright Rettenmeyer, during her life time, kept personal effects including government bonds, in a safety deposit box in the First National Bank and Trust Company of Oklahoma City, Oklahoma. Some of the bonds complained of were obtained by Joseph A. Rettenmeyer, husband, who had power of attorney and Embry, Johnson, Crowe, Tolbert & Boxley, personal attorneys of Rosa B. Wright Rettenmeyer. The life insurance policy and annuity bank and other government bonds purchased. Later these other bonds were cashed through the bank and the funds thereof deposited in the bank to the account of Rosa B. Wright Rettenmeyer. the life insurance policy and annuity contracts in question were purchased from Aetna Life Insurance Company and a check issued therefor. Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, and Justin W. Faherty, respondents herein, were all vice-presidents and department heads of respondent bank and handled all of the said transactions. Two actions were brought against these parties together with Aetna Life Insurance Company. One was filed in Creek County, and the other in Tulsa County. In each of these actions it was alleged that these parties, with others, by common design and purpose

> "did on or about the 31st day of October, 1950, secretly and surreptitiously enter the safety deposit box of said Rosa B. Wright Rettenmeyer in the First National Bank and Trust Company of Oklahoma City and, without authority of law, wrongfully and illegally take, steal and carry away therefrom the U. S. government bonds herein referred to."

Punitive damages were also asked in said actions.

The respondents intervened in the action in the United States District Court of the Northern District of Oklahoma wherein Aetna Life Insurance Company, a corporation, was plaintiff and the petitioners were defendants, because there was a question of law and fact in common and because these intervenors had a pecuniary interest in the subject of the litigation and more particularly as to the funds paid to the Aetna Life Insurance Company for the annuity and insurance policies.

Benefits were paid by the Aetna Life Insurance Company and accepted by Rosa B. Wright Rettenmeyer in her life time, and likewise by her husband, Joseph A. Rettenmeyer, during his life time, after the annuity and insurance policies were purchased. At pre-trial conference the petitioners ratified the annuity and insurance policies and admitted the validity of the insurance contracts as well. Said admission will also be found in many other parts of the record. The brief of the Aetna Life Insurance Company cites and refers to the different parts of the record which we adopt in this brief.

Assuming the respondents had permitted a conversion, which is, of course, denied by these respondents, the ratification of the insurance contracts protects these respondents as well as the Aetna Life Insurance Company.

ARGUMENT AND AUTHORITIES.

These respondents adopt each and all answers and arguments to each and all the propositions and also each

and all the law therein cited as if made a part hereof and adopt the brief of the Aetna Life Insurance Campany as the brief of these respondents.

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